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[NUMBER I.]

I. REMOVAL OF CAUSES FROM STATE TO FEDERAL COURTS.

The article of Judge Dillon in the July number, 1876, of this REVIEW, on the Removal of Causes from the State Courts to the Courts of the United States, is admirably adapted for the practical purposes intended, and fairly exhibits the present state of the law on the *right* of removal, and the *mode* of making that right available. It would be impossible to improve his plan, or add to its details, without impairing its faultless symmetry. Having had occasion recently to critically examine the legislation of Congress on this subject, and the decisions of the Supreme Court construing that legislation, I can bear witness to the accuracy of his statements, while I have been led to doubt the correctness of one or two of his conclusions. The most important part of the legislation in question, because the most frequently brought into use, is the provision for the removal of causes "in which there shall be a controversy between citizens of different states." And the points of gravest difficulty arising thereon are, first, the jurisdiction of the state court in the matter of removal; and, secondly, the right of a litigant to "split" the suit into two parts, one part to be left in the state court and the other removed into the federal court. Judge Dillon thinks it doubtful, especially under the act of 1875, whether it belongs to the state court to judge of the sufficiency of

the surety or bond offered, and is of opinion that no order for the removal is necessary by the state court. He is also of opinion that the second subdivision of section 639 of the Revised Statutes, corresponding to the act of 1866, and which seems to contemplate the splitting of suits in certain cases, is not repealed by the act of 1875, unless, indeed, a "liberal construction" (by which I understand him to mean a construction which would imply from the language of the latter what is actually expressed in the former) shall be, and can constitutionally, be given to the latter portion of section 2 of the act of 1875. Both of these opinions deserve grave consideration.

It is not to be denied that there are decisions of the circuit and district judges of the United States which tend to these conclusions. *Osgood v. Chicago Railroad Co.*, 2 Cent. L. J. 275, 283, per Drummond, Circuit J.; *s. c.*, 6 Biss. 330; *Mer. & Man. Bk. v. Wheeler*, 3 Cent. L. J. 13, per Johnson, Dist. J.; *Conner v. Scott*, 3 Cent. L. J., 305, per Parkes, Dist. J.; *Stapleton v. Reynolds*, 9 Chic. Leg. News, 33, per Swing, Dist. J. It is to be noted, however, that the last three decisions are based upon the first, and that, in this first case, the right of removal independent of the action of the state court seems to have been conceded by the learned counsel of the parties who were applying for a remand. 2 Cent. L. J. 284; 6 Biss, 340. It must also be borne in mind that the learned circuit and district judges of the United States have almost invariably assumed the truth of the maxim, that it is the duty of a good judge to enlarge his jurisdiction. We have had evidences of this fact, not only in the construction put by them on the acts in question, but in their construction of the bankrupt laws wherever those laws seemed to infringe upon the jurisdiction of the state courts. And in thus enlarging the sphere of their operations they have sometimes unnecessarily, perhaps unconsciously, seemed inclined to treat the state courts with scant courtesy, as alien and hostile tribunals. The Supreme Court of the United States, however, occupying a higher vantage ground, and having a wider sweep of vision, have had a keener

insight of the fitness of things, and have never failed in that lofty courtesy which honors him that gives and him that takes. We cannot err if we follow the decisions of that august tribunal, and, in the absence of positive rulings, be guided by the principles which underlie those decisions, and the incidental suggestions thrown out in making them.

The "present state of the law" consists of the statutes now in force, to be read by the light of previous statutes in *pari materia* and the adjudications of the court thereon. For, the presumption is that the language in which the law-maker recasts the laws on a given subject is used in the sense already fixed by judicial construction, or with special reference to that construction, either in the way of adoption or avoidance. Accordingly, the article referred to commences with a historical résumé of previous legislation and judicial decisions on the subject, as essential to a proper understanding and correct interpretation of the existing statutes. The act of March 3, 1875, repeals "all acts and parts of acts in conflict" with its provisions, and, as far as it goes, embodies the last expression of legislative will. The *mode* of removal of a suit from a state to a federal court is, by the third section, thus provided for: "Whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suits mentioned in the next preceding section, shall desire to remove such suit from a state court to the Circuit Court of the United States, he or they may make or file a petition in such suit in such state court before, or at, the term at which said cause could be first tried and before the trial thereof, for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit, if special bail was originally requisite therein, it shall

then be the duty of the state court to accept said petition and bond, and proceed no further in such suit, and any bail that may have been originally taken shall be discharged; and the said copy being entered as aforesaid in said Circuit Court of the United States, the case shall then proceed in the same manner as if it had been originally commenced in said circuit court, etc." The corresponding provision of the act of 1789 enacts that the applicant "shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next circuit court to be held in the district where the suit is pending, and offer good and sufficient surety for his entering, in such court, on the first day of its session, copies of said process against him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein, it shall then be the duty of the state court to accept the surety and proceed no further in the cause, and any bail that may have been originally taken shall be discharged; and the said copies being entered as aforesaid in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process," etc.

Thus placed in juxtaposition and read together, it will be seen that the provisions of the two acts prescribing the mode of removal are identical in substance. In both, the applicant must file his petition and offer good and sufficient surety for precisely the same purpose, with the addition in the act of 1875 of a provision for the payment of costs if the federal court shall hold that the suit was improperly removed—an addition not in the least affecting the nature of the application. By the act of 1789, when the petition is filed and good and sufficient surety is offered, it is made the duty of the state court "to accept the surety and proceed no further in the cause." By the act of 1875, when the petition and bond with good and sufficient surety are filed, it is made the duty of the state court "to accept said petition and bond and proceed no further in such suit." The two provisions are substantially one and the same. Nor is

there anything in the suggestion that there has been a change in the time when the petition for removal may be filed, because of the words in the act of 1875 authorizing the filing of the petition for removal "before or at the term at which said cause could be first tried." The idea seems to be, that these words authorized the filing of the petition in vacation, and *therefore* the action of the state court is not necessary. But the act of 1789 authorized the petition for removal to be filed by the applicant "at the time of entering his appearance in such state court," and this might be in vacation as well as in term time. 1 Har. Ch. Pr. 169; Sweeny v. Coffin, 1 Dill. 75. Besides, the words of the act of 1875 were manifestly intended to make certain the right of the applicant to file his petition for removal at any time before the trial term, which might be at the appearance term, or even earlier, and "at the time of entering his appearance in such state court." There is nothing in the difference in the wording of the two acts to create a substantial distinction between them. The duty of the state court, and its rights, if it have any rights, are identically the same under both acts.

The language of each of these acts fairly implies positive action on the part of the state court in accepting the petition and surety, and concedes the continuance of its jurisdiction until a copy of the record is "entered as aforesaid in said Circuit Court of the United States * * * on the first day of its then next session." There cannot be a doubt, moreover, that the state court would have the right to proceed in the cause after an application to remove, if, in fact, the application itself, or the case made by it, were insufficient to justify the transfer, or if the transfer were not perfected by filing the record in the circuit court at the time required. The jurisdiction of the United States court cannot attach until the jurisdiction of the state court has terminated, and that can only be when the state court has acted upon the application, and conscientiously performed its duty, which it is to be presumed it always will do, by accepting the petition and surety. This was the uniform practice under the act of

1789, and has been recognized as the proper practice by the Supreme Court of the United States. "To obtain the transfer of a suit," says Waite, C. J., "the party desiring it must file in the state court a petition therefor and tender the required security. Such a petition must state facts sufficient to entitle him to have the transfer made. This cannot be done without showing that the circuit court would have jurisdiction of the suit when transferred. The one necessarily includes the other. *If, upon the hearing of the petition, it is sustained by the proof*, the state court can proceed no further. It has no discretion, and is compelled to permit the transfer to be made. The petitioning party is then required to file in the circuit court copies of the process and of all pleadings, depositions, testimony, and other proceedings in the state court. *This includes the proceedings by which the transfer was effected*, and these, as has been seen, must show the facts necessary to give the circuit court jurisdiction." *Railway Company v. Ramsey*, 22 Wall. 328.

This language unquestionably recognizes, not merely the right of the state court to act upon the application, but the necessity of its action. It was used previous to the passage of the act of 1875, but upon statutory provisions substantially in accord with those contained in that act. The ruling is replete with the downright practical good sense so characteristic of the present Chief Justice of the United States. Any other course would lead to confusion and unseemly conflict, without the least necessity. The state courts are as much bound by the provisions of the constitution of the United States, and the laws passed by Congress in accordance therewith, as the federal courts, and are as little liable to err in the judicial construction of these laws as the inferior courts of the United States, and, if they do err, are subject to the same mode for the correction of their errors in this regard as the inferior United States courts. They must, subject to such correction, determine for themselves, in the first instance, whether the case presented is one for their cognizance, or for the cognizance of the federal courts. They may err, but the error is to be corrected in the modes

pointed out by law, not by the federal courts assuming jurisdiction of a case with which the others have not yet parted. That would be to make the unfortunate suitors bear the burden of double litigation at one and the same time, and that too by tribunals of the same government working, to this extent, under the same laws, the same official oaths, and the same sense of duty.

It is undoubtedly true, that if a proper case for removal is made out, and the petition and bond are in conformity with the requirements of the law, it is the duty of the state court to accept them, and make the proper order of removal, and any step taken in the cause thereafter by that court would be clearly erroneous, and subject to reversal for that reason alone, either by the appellate state court or by the Supreme Court of the United States. *Gordon v. Longest*, 16 Pet. 97; *Kanouse v. Martin*, 15 How. 198; *Insurance Company v. Dunn*, 19 Wall. 214; *Gaines v. Fuentes*, 92 U. S. 10. But it is equally true, that if the state court improperly orders a suit to be removed to the United States court, it is the duty of the latter to remand it. *Knapp v. Railroad Company*, 20 Wall. 117. And it is also true, that, although the application to remove be made in due form, and the bond offered be unexceptionable, the state court may, in a proper case, refuse to order the removal, and will continue to have exclusive jurisdiction of the cause. *Case of the Sewing Machine Companies*, 18 Wall. 553; *Vannevar v. Bryant*, 19 Wall. 41. In either event, the ultimate decision of the question of jurisdiction rests with the courts of the United States. Each court must, however, in the first instance decide for itself whether it should proceed, subject to the revising power of the Supreme Court of the United States. It is not to be supposed that the state courts would decline to make the necessary order of removal in a proper case, and, on the contrary, the legal presumption would be that a refusal so to do was the result of the exercise of the judge's best judgment in the conscientious discharge of duty. Useless expense may be thrown upon litigants by an error of judgment in the right of removal, but this is as likely to occur in the Circuit Court

of the United States as in the state court. The evil is an incident to the fallibility of human judgment, and the complicated structure of our judicial systems. The same evil is an incident to the exercise of the separate jurisdictions of law and equity by the courts of the United States, as litigants sometimes find to their sorrow after protracted litigation at law, when they should have gone into equity, or *vice versa*. The only mode of preventing unseemly conflicts between the state and federal courts to no profit is by leaving the jurisdiction in the state court until it has finally parted with it by the necessary order. And so the Supreme Court of the United States has unequivocally said, through its chief justice, in the language above cited. There is no clear indication in the act of 1875 that Congress intended to interfere with the preëxisting practice, or to change the construction put by the courts upon the language borrowed from the previous statutes, nor is there any sound reason for inferring any such intention. The provision of the seventh section authorizing the Circuit Court of the United States to issue a *certiorari* to the state court in a possible, though not probable, contingency, is obviously not enough to affect these conclusions. It follows that it is the duty of the state court to act in the first instance upon the application made, and to determine, under all the solemn sanctions of judicial office, whether a proper case for removal is presented, and to adjudge accordingly.

Previous to the act of 1875 the law regulating the removal of causes from the state to the federal courts on the ground of the citizenship of the parties was well settled. The constitution of the United States, by Art. III, § 2, provides that the judicial power of the general government shall extend to "controversies between citizens of different states." But it has been uniformly held by the Supreme Court of the United States that the jurisdiction of the courts of the general government depends on the acts of Congress, and not on the constitution, except as put in force by legislation. The judiciary act of 1789, by its twelfth section, merely authorized the defendant in a suit brought in the state court by a

citizen of the state against a citizen of another state to remove the suit by petition made at the time of entering his appearance. Under this act it was invariably held that a cause could not be removed unless all the material plaintiffs were citizens of the state in which the suit was brought, and all the material defendants citizens of some other state or states, and unless the application was made by all of the defendants. No removal could be had if any one of the material parties defendant was a citizen of the same state with any one of the material plaintiffs, nor if the requisite citizenship of all the opposing litigants did not exist, nor unless all of the material defendants concurred in the application, though at different times. *Ward v. Arredondo*, 1 Paine, 410. The act of July 27th, 1866, undertook to allow one defendant, in certain cases, to remove the suit where there could be "a final determination of the controversy, so far as concerns him, without the presence of the other defendants as parties in the cause," leaving the suit in the state courts as to the other defendants. In *Gardner v. Brown*, 21 Wall. 36, the application for removal was under this statute. The bill was filed by a creditor, whose debt was secured by a trust assignment of realty, against the grantor and trustee to enforce the execution of the trust. The creditor and the trustee were citizens of the state in which the suit was brought, while the grantor, the debtor, was a citizen of a different state. It was held that the latter could not remove the cause to the federal court. A similar decision, under the twelfth section of the judiciary act, had been made by the Supreme Court of Tennessee in *Dunn v. Waggoner*, 3 Yer. 59, the opinion having been delivered by Catron, C. J., afterwards an eminent associate justice of the Supreme Court of the United States. The act of Congress of the 2d of March, 1867, gave a defendant, against whom a suit was brought in a state court by a citizen of the state, and who was a citizen of another state, the right of removal upon affidavit that, from prejudice or local influence, he believed he would not be able to obtain justice in the state court. It was thought by even such distinguished judges as Mr. Justice Miller and Judge Dillon

that one defendant of several might, under this act, remove a suit as to all of the defendants, although some of them were citizens of the same state with the plaintiffs. *Johnson v. Monell*, Woolw. 390; *Sands v. Smith*, 1 Dill. 290. But the Supreme Court of the United States decided otherwise where the suit was *ex contractu* in the case of the Sewing Machine Companies, 18 Wall. 553, and where the action was in *tort* in *Vannevar v. Bryant*, 21 Wall. 41. And in *Knapp v. Railroad Company*, 20 Wall. 124, Mr. Justice Davis says of the act, that "it does not change the settled rule that determines who are to be regarded as the plaintiff and defendant."

There is nothing in the act of 1875, unless we resort to a very "liberal construction" indeed, which expressly changes, or even discloses an intention of changing, the preëxisting law in this regard, but rather the contrary. Its close adherence to the letter of the earlier enactments would indicate a clear intent to adhere to the settled construction and usage, while the use of the words "a controversy which is wholly between citizens of different states, and which can be fully determined as between them," seems designed to remove all doubt as to the legislative will. The first section of the act of 1875 enlarges the original jurisdiction of the Circuit Courts of the United States, using for this purpose, upon the matter now under consideration, the very words of the constitution, but containing nothing implying an intention to require a departure from the uniform construction put upon similar language in the previous decisions. The second section, touching the removal of causes, enacts: "That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, * * * in which there shall be a controversy between citizens of different states, * * * either party may remove said suit into the Circuit Court of the United States for the proper district. And when, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either

one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

Looking at the general scope of this section, without critically scrutinizing its words, it would not seem to be intended to effect a radical change in the existing construction of statutes in *pari materia*. The privilege of removal is conceded to both plaintiff and defendant, and the enactment is more nearly in the words of the constitution. The first paragraph, if we lay no stress upon the use of the words "suit" and "controversy," is, in substance, the twelfth section of the judiciary act of 1789, only extending the privilege of removal to both the plaintiff and defendant instead of the defendant alone. In that view, the uniform construction of the original section would apply, namely, that the removal cannot be had unless all the material plaintiffs and all the material defendants are citizens of different states, nor unless all the material parties on one side concur in applying for the removal. The meaning given to similar language by uniform judicial construction must prevail in the absence of anything to show a clear intent to work a change. The second clause contemplates only the removal of a suit or controversy which is "wholly between citizens of different states and which can be fully determined between them." If the intention was to remove the entire suit as to all parties, without regard to citizenship, merely because there was in it a controversy between citizens of different states, at the instance of one of those parties, then the words "which can be fully determined as between them" were worse than useless. These words fairly imply that the suit or controversy may be removed as to them, whenever the controversy could be fully determined between them, but not otherwise. This is precisely the provision of the act of 1866 which was construed in *Gardner v. Brown*, 21 Wall. 36, and the decision was that the suit could not be removed if any one of the material parties on the same side as the applicant did not have the requisite citizenship. The act of 1866, it is true, went on to expressly provide that the removal in the contingency

contemplated should not prejudice the right to continue the litigation in the state court between the other parties. But it is obvious such a provision was supererogatory; for, if the right to remove was confined to the matter of controversy, which could be wholly determined between the parties to the removal, the jurisdiction of the state court would necessarily remain undisturbed in all other respects. That jurisdiction can only be affected by extending the judicial power of the general government, within the provision of the constitution, over the subject-matter and the parties.

The argument has been made by some of the learned circuit and district judges that the act of 1875 provides that when in any *suit* there is a *controversy* between citizens of different states, either party may remove the *suit*, and that this language authorizes, upon the application of one of several plaintiffs or defendants, the removal of the *whole suit* as to all parties, without regard to citizenship. This construction ignores the words, "which can be fully determined between them," already commented on. The right of removal is made to depend entirely upon the very fact that the controversy may be fully determined between these citizens of different states; and why it should be so if the entire suit is to be removed, it is difficult to understand. Besides, the act of 1867 used identically the same language, that where a *suit* is pending in which there is a *controversy* between, etc., the party may apply to remove the *suit*. It was the use of this very language which led to the decision of Judge Dillon in *Sands v. Smith*, 1 Dill. 290. And precisely the same argument was made before the Supreme Court of the United States in the case of the *Sewing Machine Companies*. Mr. Justice Clifford, in delivering the opinion of the court in that case, says of this argument: "It is difficult to see in what particular the jurisdiction of the state court is lessened by the last act (the act of 1867), or in what respect the difference in phraseology supports the theory of the defendants, as 'a suit by a plaintiff against a defendant' must mean substantially the same thing, in the practical sense, as 'a suit in which there is a controversy

between the parties,' as each provision includes the word 'suit,' which applies to any proceedings in a court of justice in which the plaintiff pursues his remedy to recover a right or claim." The learned justice emphatically condemns the suggestion that one party, who may bring himself within the letter of the act of Congress, can carry with him, against their will, all other parties. "Nor does it (the act of 1867)," he says, "give any sanction whatever to the proposition that the resident defendant shall be compelled or permitted, under any circumstances, to go elsewhere to answer the suit." To the same effect is the language of Mr. Justice Davis in *Knapp v. Railroad Company*, 20 Wall. 117.

The argument relied on, pushed to its logical results, would enable a single non-resident party, either plaintiff or defendant, to remove from the state court into the federal court the administration of estates, the settlement of trust assignments, creditors' bills, or any kind of case, however numerous the resident parties, and carry with him *in invitum* all the other parties. When it is considered how little the machinery of the judicial system of the United States is adapted for such an increase of its business, and how ruinously it would affect a large class of litigants to be compelled to attend these courts from remote distances, it is not to be supposed that Congress would so extend the judicial power of its courts, even if it had the constitutional authority, without the clearest and most unequivocal declaration of intention to that effect. The acts under consideration contain no such declaration, nor fairly imply any such intent. The only suit or controversy which can be removed is one "which is wholly between citizens of different states, and one which can be fully determined as between them." And this positive provision repeals any provisions of previous statutes in conflict therewith, if such there be.

The language of the constitution of the United States is that the judicial powers shall extend to "controversies between citizens of different states." To come within this language the opposing litigants must be citizens of different states. The object of the provision was to secure an impar-

tial tribunal for the decision of such controversies. A controversy not altogether between citizens of different states would neither be within the letter nor the reason of the constitution. An act of Congress which sought to remove into the federal courts any other controversies than those between citizens of different states would seem to be clearly unconstitutional. The act of 1875, construed as above contended for, appears to be free from all exception. It would be otherwise if it admitted of the construction sought to be put upon it by the argument above combatted. The latter construction finds not the least support in any adjudication of the Supreme Court of the United States. And, perhaps, it will be time enough to enquire into the limits of the power of Congress when, in the language of Mr. Justice Clifford, "the words of the enactment are of a character to warrant the construction." Case of the Sewing Machine Companies, 18 Wall. 587. At present the last expression of the legislative will, the act of 1875, seems to be free from constitutional objection, and to have repealed whatever was obnoxious to such objection in the previous statutes. At any rate, this is the impression made upon the writer after studying it critically by the light of the decisions of the Supreme Court of the United States, made, it is true, upon the previous statutes in *pari materia*, but upon provisions brought forward, in substance and form, into the later act.

Since the foregoing was written, the *Central Law Journal* for February 9, 1877, has been received. It contains the opinions of Treat and Dillon, JJ., in the case of Cape Girardeau R. v. Winston *et al.*, recently decided at St. Louis. The application was to remand the cause, which had been removed from the state court under the second clause of section 639 of the Revised Statutes. The removal had been made at the instance of two of the defendants, and was an attempt to remove part of a cause, when the record clearly showed that co-defendants were necessary parties to the relief sought by the bill. Both judges concurred in thinking that the removal was improper, and in ordering a remand.

Judge Treat was of opinion that the second clause of section 639, Revised Statutes, was repealed by the act of March 3, 1875. He was also of opinion that the provisions of that clause, if not thus repealed, were unconstitutional and void. "If," says he, "the purpose of this act (1875) was to restore what, obviously, is the constitutional limit of the jurisdiction of the United States courts, by confining them to controversies which are wholly between citizens of different states, then the act of 1866 is repealed." If not repealed, he unhesitatingly adds, "those peculiar provisions of the act of 1866 must be held to be unconstitutional and void." The writer's own previous convictions have been, of course, greatly strengthened by the conclusions of this eminent judge, put in that luminous and incisive style so characteristic of his opinions. And, he may add, it is refreshing to find a United States judge who can see that an act of Congress is unconstitutional, and plumply say so.

W. F. COOPER.

NASHVILLE, TENN.

II. THE ELECTION OF JUDGES BY THE PEOPLE FOR SHORT TERMS OF OFFICE.

The inevitable tendency of all free institutions is to radicalism. Free thought and free discussion bring two great forces into perpetual conflict—the one radical, the other conservative. The former is positive and aggressive; the latter, negative and defensive. The first assails, the last resists. It is a conflict of ideas, in which there can be no doubtful result. The active, positive, moving force ever prevails against the negative, quiescent, resisting force. This active force in a free country is democratic sentiment, the constant tendency of which is to carry all established institutions irresistibly forward in the direction of radicalism. Nor is it difficult to comprehend the philosophy of this social and political phenomenon.

There is nothing more natural to the human mind than to accept abstract propositions and follow them to their logical consequences, without regard to the existing conditions to which they are to be applied. This process of thought is at once natural and unphilosophical. The shallow thinker imagines that he sees in this logical process profound philosophy. The lazy investigator finds in it a ready solution of all difficult problems, without the painstaking labor required by the process of induction from innumerable facts. To say that certain things are true and right, and that they shall therefore be done, whatever may be the existing conditions of society and government to which they are to be applied, is the simple deduction of shallow and lazy thinkers. But to determine truly with what modifications abstract truths are to be applied to existing conditions, so as to avert possible evils and promote the well-being of society, demands the profoundest insight into men and things, as well as careful investigation and thorough knowledge. A great scholar

and legist has said with sententious wisdom that "many things which are true in the abstract are not true in the concrete." The founders of our institutions understood the full truth of this apothegm, and they acted upon it in laying the foundations of the system which they established. They were not mere theorists, nor *doctrinaires*, nor utopian legislators. They were great lawyers, practical philosophers, and wise statesmen, experienced in affairs. They recognized the principle of popular sovereignty. They were too wise not to know that the will of the people must needs be a great factor—nay, the greatest factor in any system of government to be established in a state of society where neither military power nor traditional rights exist. Hence, they skilfully wrought into the framework of our institutions the principle that the consent of the governed is the only legitimate source of human authority over the people. But in framing our early constitutions the fathers did by no means blindly follow the doctrine of popular sovereignty to its logical consequences. On the contrary, while recognizing fully the doctrine that sovereign power in this country resides nowhere but in the people, they carefully and studiously erected powerful barriers to arrest, control, and sometimes defeat, the popular will. Well did they know that any government purely popular, without checks and balances, and without bulwarks to resist the storms of popular frenzy and passion, would in time become intolerable, and end, according to all human experience, in despotism. The fathers evidently believed that between the tyranny of one man and the tyranny of an unrestrained popular majority, the balance of evil would be largely with the latter. Did they recognize the absurd dogma that all men, all women, and all children, at the age of discretion, have an inalienable right, without experience or training, to participate in the government of the country? Did they for a moment assent to the proposition that to fight and to vote are correlative rights, and that the bullet and the ballot must be wielded by the same hand? On the contrary, they postponed universal suffrage for many years after the close of the Revolution, and until the people

who had been living under monarchical form, without the training required to vote intelligently in a republic, became, to a certain extent, politically educated. Their idea seems to have been that the mass of the people must be trained to the great and responsible duties of self-government before they could exercise the right of suffrage with safety to the common weal. Little did they dream of perpetrating the monstrous and criminal folly of introducing, without the least preparation, into the body politic vast hordes of ignorant, illiterate, and semi-barbarous men, to vote away the property of their fellow-men, and subvert all civil order! If the fathers had been called upon to consider the question of negro suffrage under the same circumstances in which this generation of statesmen had to deal with that problem, they would probably have reasoned thus: "Let us by no means establish a constitution excluding these four millions of freedmen absolutely from the suffrage, lest we make the whole race enemies of the government under which they are to live. It is not consistent with the true idea of a republican commonwealth to exclude by arbitrary designation large numbers of people from all participation in the government. The deprivation of essential rights tends inevitably to make those who are thus excluded, enemies of the government. Let us, therefore, take measures to prepare these people, by education and political training, for the great duties of citizenship; and let us introduce them slowly and gradually as members of the political community. Thus may we at once satisfy the just and natural aspirations of the colored race, and prevent them from becoming the victims of demagogues and designing politicians, who will otherwise mislead them to their own injury, and to the irreparable detriment of society."

Many were the barriers which the wise fathers erected to oppose the popular will; many the obstructions which they placed in the way of unrestrained popular sovereignty. Consider the Senate of the United States. The people are not represented in that body at all. Its members are not elected by the people. The state of Delaware utters as potential a voice in the legislation of that illustrious assembly as the

state of New York. Two senators, speaking for that little commonwealth of one hundred thousand people, may negative the voice of the great state of New York, with its five millions of inhabitants. Here the principle of popular sovereignty is completely ignored and set aside! The Senate was intended to be, and is, an obstruction to the popular will; yet what American citizen would consent to abolish the Senate? What political thinker, worthy of the name, will affirm that the founders of the government acted unwisely in the institution of that branch of the legislature, or deny that it has worked well in the operation of the system?

Again, in the organization of the executive department our ancestors sought to raise restraining obstacles to the will of popular majorities. It is well known that it was not their purpose that the president should be elected directly by the people. On the contrary, they intended so to organize the electoral colleges as to place the election of president in the hands of the small number of independent men elected, indeed, by the people, but free to exercise their own judgment and discretion in the choice of the chief magistrate of the nation. With this view, no doubt, they gave to each state two electors at large, corresponding to its two senators, without regard to population. Thus they made it quite possible that a president should be chosen by a popular minority, and it is a familiar fact of our history that several of our presidents were elected in opposition to a majority of the popular vote. And being so chosen even by a minority of the votes, the president is clothed with a power, under the constitution, which enables him with a single word to silence the mighty voice of the whole people, uttered by their chosen representatives in Congress.

Thus we see that the fathers by no means intended to carry into the practical organization of the government, even in its political departments, the vaunted principle that the will of the people shall become the supreme law.

The fathers were too wise and too honest to give assent to the false and blasphemous dogma, that "the voice of the people is the voice of God." They had read history, and from its

"pictured page" they had learned that the voice of the people is not unfrequently the voice of the devil! They had heard the voice of the people in the enlightened, polite, and art-loving Athenian democracy, condemning to death without cause their wisest citizen, and banishing another equally illustrious, because they were "vexed" to hear him everywhere called "the just." They had heard that potential voice in the Roman forum—now applauding one usurper, now another; to-day following with shouts of approbation the tyrant Sylla, to-morrow the tyrant Marius! They had heard it uttered in the streets of the great city at the death of the usurper in wild cries for vengeance against their own deliverers! They had heard the voice of the people in the mother country, demanding the burning of witches and heretics, sustaining the accursed slave trade, and approving of the judicial murder of many illustrious men. They had heard that voice in the wild uproar of Polish diets and French conventions; they had seen the popular judgment written in letters of blood and fire upon the short and terrible annals of more than one fallen republic! The fathers well knew what history, ancient and modern, but too clearly reveals that faction and party spirit not unfrequently prevail in republics over truth, reason, and justice; that party spirit is a blind, unreasoning, malign spirit; and that a government, echoing the unrestrained voice of faction, and dominated absolutely by party spirit, cannot, in the nature of things, but be affected by the sources of its inspiration.

But it is to the judicial departments of our early governments, both federal and state, that we must look for the clearest revelation of the purpose of the fathers to build their systems upon something more substantial than the mere breath of popular majorities. It was evidently their purpose to make the judiciary perfectly independent of the people, as well as the government. This they sought to accomplish by the manner of their appointment, the tenure of office, and the mode of compensation.

The wise men who "came down to us from the Revolution" would have been astounded at a proposition to make

the judges of the land elective by the people. They would not consent even to allow the House, in which the people are directly represented, to participate in the appointment of the judges. They committed the power of confirmation to the Senate, in which it was supposed the voice of the people would be silent. They withheld from the whole government the power to remove a judge except by impeachment. They forbade any reduction of the salary of a judge during the time of his continuance in office. But in a large number of the states of the Federal Union this wise policy respecting the judiciary has been swept away by the drift of public sentiment toward radicalism. The judges in many states are now elected by universal suffrage for a short term of office, and the manifest tendency in all the states is strongly in the same direction. This is a momentous change! Is it a wise one? Or, on the contrary, is it but another proof, of which history furnishes so many, that all change is not progress—all innovation not improvement.

The fathers had read the history of the mother country—they knew it by heart. They had seen the working of a dependent judiciary in that country. They had doubtless noted that so long as English judges were dependent upon the crown they were subservient to the crown, and so long were the streams of justice flowing from that polluted source impure. They had noted the corruption, the craft, the self-abasement of English judges when it became their interest to conciliate that power in the state upon which they depended for their continuance in office and their salaries. They had seen exhibited in English history the amazing and humiliating spectacle of illustrious magistrates, judges of the highest dignity, crawling to the footstool of kingly power, like prostrate slaves before some eastern despot! They had seen law perverted and set aside, and the holy of holies—the very temple of justice itself—polluted and prostituted by such base creatures as Scroggs and Jeffries, Saunders, Wright, Allybone, and a score more with the ermine—sacred emblems of judicial purity—upon their shoulders. The fathers had, indeed, before their mental vision the long line of dead English

patriots—the Elliotts, the Raleighs, the Russells, the Sidneys, the Harrisons, the Vanes, the Staffords, and how many more victims of judicial subserviency—marching in mournful procession to the prison and the block, not to expiate any crimes they had committed against the state, but to satisfy the vengeance of king or people!

Then, again, the founders of the government had seen a great change in the history of English jurisprudence. At the Revolution of 1688 the judges were made partially independent. Their commissions were made to run during good behavior, but it was held that the demise of the crown immediately vacated their seats. To remedy this construction of the statute of 13 William III. c. 2, the Parliament passed the act of 1 George III. c. 23, which provided that the commissions of the judges should continue during good behavior, notwithstanding any demise of the crown, and that their full salaries should be absolutely secured to them during the continuance of their commissions. The great and salutary change which resulted from these acts in the administration of English law is well known to every student of the judicial history of England. Indeed, it may be truly said that from the time when the judges were made independent in the mother country the administration of justice became so wise, so enlightened, and so important, as to reflect ineffable glory upon the whole English-speaking race.

The far-seeing founders of our institutions embodied the lesson of wisdom, which they had thus learned from the history of the mother country, in our early constitutions. We have in our day and generation taken a vast stride in the opposite direction. We have in a great number of states made the judges dependent, not upon the executive government, but upon the popular will. Is the change a wise one? The American bar certainly does not approve of it; and the members of the bar are not only the best judges of such a matter, but they have had the best possible opportunities of observing the results of the change, and of forming a correct judgment concerning it. What is the difference in the principle and practice between making the judges dependent

upon the people and dependent upon the executive head of the government? In my judgment it would be far better to make them dependent, if dependent at all, upon the executive than upon the people. It is only in political questions sometimes, though rarely involved in private litigation, that the executive government takes any special interest in the administration of justice by the courts. Even the kings of England desired to see the laws impartially administered between private litigants. It was manifestly their interest that the king's courts should render impartial justice to their subjects. They rarely interfered with the courts, except in cases involving the interests and prerogatives of the crown. But how is it with King Public Opinion? Does he not interest himself in a vast variety of cases, involving mere individual right and private litigation? Does he not often, as well in the remote corners of the land as at the seat of government, assume to influence, revise, and sometimes overrule, judges as well as juries? Is this King Public Opinion at all scrupulous with respect to his interference with the functions of the courts of justice? Is he not often arbitrary, one-sided, prejudiced, ill-informed, yet violent and dominating? To speak plainly, it is safe to affirm that popular opinion not unfrequently becomes violently excited, not only upon public questions, but upon many cases of mere private concern. This is perfectly well known to every intelligent observer, and it is equally well known that public opinion is not seldom influenced and controlled by party spirit, religious bigotry, and personal prejudices. Now, a judge sitting to administer justice in the midst of an excited populace, upon whose will his future judicial existence depends, must be elevated above ordinary human nature not to be moved or affected by such influence. True, if he be a Marshall, or a Story, or a Holt, or a Mansfield, no such popular influences would for a moment disturb his judicial balance and integrity, but it will be well to remember that we ought to frame human laws, not to provide against the apprehended delinquencies of such men as Marshall, Mansfield, Holt, and Story, but to protect ourselves against the erring judgment and weak virtue of that far

inferior race of judges who are certain, with rare exceptions, to fill judicial stations in this country.

Nothing surely could be more shocking to our sense of justice and propriety than that a court of justice should be influenced in its judgments between man and man by outside popular opinion. Such a thing would be certain to wound deeply our American sense of justice and propriety. Yet, with strange inconsistency, our people have in many states deliberately set aside the wisdom of the fathers, and exposed their judges to such temptations that nothing but that lofty virtue and independence of personal character, which cannot be expected in the ordinary incumbent of judicial office, can give assurance that the courts will not be influenced by the prevailing popular opinion. They, of course, who affect to believe that the voice of the people is the voice of God, will have no difficulty with this matter. They will solve this as they do all other questions. They will simply say, let us have the voice of God in our courts of justice as elsewhere; but this reasoning will give little satisfaction to the judgment of any man who knows the power of faction, prejudice, and bigotry, operating upon ignorance and passion, in shaping and moulding popular opinion.

The fundamental objection to an elective judiciary is that the people have no right to be represented in a judicial proceeding. Public opinion ought never to be heard in a court of justice. The very idea of popular representation in a judicial proceeding is a false and odious idea. On the contrary, if all the people in all America should demand judgment against the humblest individual, yet, if right and justice were with him, a court of justice should, in disregard of universal opinion, give judgment in his favor. In this respect there is a fundamental difference between legislative and judicial functions. The people ought of right to be represented in the making of the laws, but not in their administration by the courts. The legislator enacts a general law, the burdens and obligations of which fall alike upon his friends and foes, and in this we have a sufficient guaranty that the legislator will not pass oppressive laws. But the judge pro-

pounces sentence in a particular case between individuals, or between the government and individuals, and he may therefore, if so disposed, without wounding his own friends and supporters, give judgment in favor of the party who controls the greater power or commands the greater number of votes. At all events, an elective judge is exposed to this temptation; and what is most unfortunate, both to him and the public, is that he is liable to suspicion by reason of the existence of a known temptation, even where his rectitude is clear.

Since all men reject without the least hesitation the idea that the popular voice should be heard in a court of justice, or that it should have the slightest influence in the decision of judicial questions, what are the reasons which have induced the change in our state constitutions by which the judges are made elective by the people? It is surely not that judges should be responsible to the people for decisions made by them in the administration of justice; for how are the great mass of the people to know whether the decisions of the judge are right or wrong—in accordance with law or otherwise? Perhaps the idea underlying the great change of policy respecting the mode of appointing judges may be found in the belief that the people are capable of making a wiser choice of judges than the executive head of the state would be. There are many demagogues who affect to believe, and some honest people who, by dint of repetition, have brought themselves to believe, that the popular judgment of men and things is well nigh infallible. The former deliberately court the people and flatter them for a purpose, just as sycophants and courtiers have been known to fawn upon and adulate a reigning king. The latter class, more honest and simple-hearted, habitually appeal to the judgment of the people as the infallible standard of right and wrong; and the most crushing judgment they have to denounce upon any poor erring mortal who cannot assent to their theories of law and government, is that he will be condemned and rejected by the people! Both of these classes—the one for a purpose, the other from ignorance and prejudice—unite in maintaining the wisdom of electing all officers, including the judges, by the people.

But without questioning the infallibility of the popular mind, let us for a moment enquire what are the inevitable consequences of making the judiciary subject to popular election. Is it not notorious that it brings the judicial office into direct connection with party politics and all the bad methods and influences of faction? Who will deny the somewhat startling assertion that, under the elective system, the party caucus does, in fact, appoint the judges of the land? Wherever either party is dominant, it makes the election of judges strictly partisan, and uses the judicial office as a part of its patronage. To be chosen as a judge, any candidate must first be endorsed and put in nomination by the party caucus, and, to be selected by the caucus, he must resort to the usual arts of popularity; and, if he would be continued in office, he must keep up and maintain these popular arts and influences during his current term of service. Moreover, he must be careful, above all things, not to give offence to the leaders and rulers of his party. If he gives them offence, and forfeits their favor, he is lost. And who is the man most likely to get a caucus nomination? Is the thoughtful, studious, and upright lawyer, the man of ideas and books and nice scruples, or the man of inflexible love of right, truth, and justice, likely to prove acceptable to a party caucus? Is such a candidate likely to succeed in getting a nomination in opposition to the adroit wire-puller, the man of popular ways and manners, voluble tongue, and little law? Surely it requires little experience and observation to determine which of these two classes will be apt to succeed in winning favor with a caucus or a faction! And yet it will not be denied that the very arts which in general qualify a candidate to achieve party success, disqualify him largely for the duties of the judicial office.

I say that the caucus chooses the judges. Is not this true? Look at the two great states of Missouri and Iowa. Is not a nomination by the dominant party in either of these states equivalent to an election? What possible chance would any man of the minority have in Iowa or Missouri, however eminent as a lawyer, or necessary to the public service, since he could not, by any conceivable means, get a nomination

from the caucus of the dominant party? Now, what would be said of a law or constitution enacted in these terms: Be it ordained, or enacted, that the party caucus of the majority faction shall choose the judges of the state! Such a statute or constitution, made in direct terms, would startle everybody, and meet probably with universal reprobation; yet such is the undoubted practical result of making the judges elective.

And here I may remark that it is one of the singular and, it seems to me, anomalous workings of our free institutions that the country is practically deprived by party usage of the services of nearly one-half its citizens. All the offices and honors of the state are engrossed by the majority. The minority, without respect to their own merits and qualifications, and often in utter disregard of the interests of the public service, are excluded by a rigid and inflexible party usage. The minority are as completely and effectually excluded from office by this party usage as if they were disfranchised by express law. They are, it is true, at liberty to apply or run for office, just as a man without a cent in his pocket is at liberty to enter a great hotel! So far as the holding of office under the state government is concerned in such states as Vermont, Missouri, and Iowa, the minority might just as well be Indians or Chinamen, or unnaturalized Europeans, as native-born American citizens. Now, it would seem to be to the highest degree unjust and impolitic in a free republican commonwealth that the community should not be perfectly free to choose from the entire body of its citizens the individual best qualified for the public service in a given capacity; and, theoretically, our American republics enjoy this liberty, but practically it is not so. Could a democrat in Iowa or republican in Missouri, by any conceivable means, be chosen as a supreme judge of the state in the face of existing party usages and organizations, which rule elections with a rod of iron? I do not myself think the usage in question can be avoided or changed. I speak of it merely by way of illustration as an existing fact; and whilst I wish it were otherwise, I am quite aware that it is one of the incidental evils inseparable from the elective system.

Whilst this party usage works no very serious evil, perhaps, with respect to the public service generally, it is in one point of view, at least, a matter of the gravest concern when applied to the judiciary. With respect to executive and legislative offices, the majority have at least the entire body of their own partisans and followers from whom to make their selection. But judges have to be chosen from the very small number of citizens who form the body of a learned profession, and when, by a rigid party usage, the majority are confined in their choice to the members of the profession in accord with themselves, it is obvious that the number of citizens from whom the judges can be chosen is extremely limited, and that the public service must often be sacrificed to the exigencies of party.

I regard it as a great and positive evil that the judges of the land should in any way be connected with party politics; that they should owe their offices to a faction rather than to the free choice of the whole community; and that they should hold their positions under a sense of responsibility to a political party rather than the whole people. To say nothing of the evil influence that such a relation to party must exert upon the mind of the judge himself, it is obvious that he is, more or less, an object of distrust to his political opponents, and that he takes his seat without that full and unreserved confidence which would attend him if freely chosen by the whole people instead of a faction. There is, perhaps, no mode of election in this country by which the evil in question could be entirely cured. By whomsoever appointed, party views would, perhaps, have undue influence in the choice of judges, but the incumbent himself, if the old plan of appointment by the executive and senate prevailed, would be, to a considerable extent, removed from popular and partisan influences, and the candidate for judge would certainly, under that mode of selection, be less exposed to the temptation of plying the arts of popularity in obtaining and administering his high office.

Again, it is evident that the sense of responsibility is lessened as you divide and diffuse it. It is for this reason

that legislative bodies are sometimes unaccountably rash and reckless in the exercise of their powers, and, with respect to the great body of the people, it must be obvious that little sense of responsibility can be felt by the individuals composing so vast a number. Now, the appointment of a judge imposes upon the appointing power a heavy responsibility, and if this responsibility could be concentrated upon the executive head of the state, that officer would, I think, very rarely provoke the censure of the legal profession, and the indignation of the whole community, by the appointment of a bad or incompetent judge.

But what sense of responsibility can be brought home to an entire people for the election of a bad judge? Of course, to all rules there will be exceptions. A governor may be a mere demagogue or worse, and the confirming senate his accomplices in evil doing. No doubt many poor judges have by this mode of appointment been imposed upon the people, and it is doubtless equally true that many excellent judges have been chosen by popular election, but we must judge of institutions by general, not special, results. Despotism has sometimes governed wisely and well, and even usurpation has proved a temporary benefit to mankind; but who will say that despotism and usurpation are not evil things because special and temporary benefits have sometimes resulted from them?

I do not myself believe that the law for the popular election of judges can be changed. Popular privileges, once granted, are not likely to be surrendered, especially where the people are taught to believe themselves an unfailing source of all political wisdom. The only practicable remedy consists, in my judgment, in greatly enlarging the terms of judicial office, and in making the incumbent ineligible to a second election. To this, I think, the people would consent, and it would place the judge in a position of *quasi* independence. The judge being elected for a long term, the people would receive the advantages resulting from his experience in the administration of justice, and, being ineligible to a second election, he would himself have no motive to

discharge his functions with a view to securing popular favor and a future election.

Finally, let me say, that although the election of judges for short terms by the people is not, in my judgment, a wise institution, and although we have certainly taken a wrong step in that direction, yet the system does not seem to work as badly as one would be led to suppose, reasoning from cause to effect. There is, I think, far less ground of complaint than might be expected, since private justice is, in the main, administered in the states which have adopted the elective system with at least tolerable ability and impartiality. The reason is obvious. The offence of judicial corruption or partiality is so heinous a crime in the eyes of all men, and especially of the legal profession, that few judges would have the hardihood to face the community and the bar under a sense of judicial delinquency. There is very little intemperance among women, because the public sentiment will not tolerate drunkenness in a woman. A female inebriate is a spectacle shocking to behold. The same stern and inexorable sentiment of condemnation against judicial delinquencies stares every judge in the face, and deters him in general, even if so inclined, from the commission of any serious offences against the rights of litigants, and the usages, traditions, and proprieties of his station.

J. M. LOVE.

III. THE EFFECT OF A CHANGE IN THE LAW UPON RIGHTS OF ACTION AND DEFENCES.

A very interesting and important question frequently is, what effect has been produced upon a right of action, or upon a previously existing defence to an action, by a change in the law effected by statute after the right has accrued, or the cause of action has arisen, to which¹ the defence was applicable. The question is encountered in a great variety of cases, and is sufficiently important to be considered under the several heads where the cases seem to range themselves. This is done imperfectly below.

1. *Cases where Laws are Repealed which Imposed Penalties, or some Loss or Deprivation in the Nature of a Penalty.*—In cases of this nature there seems to be little room for hesitation regarding the proper rule. Where the right to recover the penalty, or to insist on enforcing that which is to cause loss to another, comes wholly from the statute, it must necessarily cease to exist the moment the statute is repealed. The result is inevitable, since the repeal of the statute takes away the foundation of the right. As the penalty, before it is recovered, is not property, and the right to it is not in the nature of a contract, the power to take it away is not inhibited by any provision of the constitution, and the legislative power of repeal is unquestionable. Nor is it of any importance in this connection whether the right to take advantage of the statute was given to the public, or to a common informer, or to some individual specially concerned; it being a mere statutory right not yet enforced, it cannot have force or vitality beyond that of the statute itself. This is the rule where a criminal penalty is provided,¹ but it applies to civil cases with equal force.

¹ *Miller's Case*, 1 Bl. Rep. 451; *Anonymous*, 1 Wash. C. C. 84; *The Irretrievable*, 7 Wheat. 551; *United States v. Tynen*, 11 Wall. 88; *Commonwealth v. Duane*, 1 Binn. 601.

The point arose in a case of no little interest and importance, which was brought under the statutes of the United States for the reclamation of fugitive slaves, and was passed upon by the federal Supreme Court. The statute of 1793, on that subject, imposed a penalty of five hundred dollars upon any person who should knowingly or wilfully obstruct or hinder any owner, his agent or attorney, in arresting a fugitive from labor, or should rescue one after his arrest, or harbor or conceal one, knowing that he was a fugitive from labor. The penalty was recoverable by the claimant for his own use, and was doubtless intended to some extent as a compensation to him for losses and expenditures which he would be likely to suffer or incur. The statute of 1850 made new provisions, which, in the opinion of the court, repealed this. A penalty having accrued under the first statute before the second was passed, suit was brought for its recovery. Mr. Justice Catron, delivering the unanimous opinion of the court, declared that the repeal of the statute which gave the penalty took away all right of recovery. The penalty, being given by the legislature, might be remitted by the legislature. There was, and could be, no vested right in it.² In rendering this conclusion the court only followed previous decisions in the same court, all to the same effect.³ The decisions to the like effect in the state courts are very numerous, and it may almost be said that the doctrine has been held without dissent,⁴ there being scarcely an instance

² *Norris v. Crocker*, 13 How. 429.

³ *Yeaton v. United States*, 5 Cranch, 281; *Schooner Rachel v. United States*, 6 Cranch, 329; *State of Maryland v. Baltimore & Ohio R. R. Co.*, 3 How. 534. This last case was also one of considerable interest, the penalty, which was remitted, being one of \$1,000,000, imposed for the benefit of one of the counties of Maryland, in order to compel the railroad company to locate its line so as to accommodate and benefit that county. See, also, *Confiscation Cases*, 7 Wall. 454. In those cases it was decided that the attorney-general might remit penalties under the revenue laws even after judgment, against the remonstrance of the informer, who would lose his interest thereby.

⁴ See *Wilson v. Hardesty*, 1 Md. Ch. Dec. 66; *Potter v. Sturdevant*, 4 Me. 154; *Oriental Bank v. Freese*, 18 Me. 107; *Lewis v. Foster*, 1 N. H. 61; *O'Kelly v. Athens Manuf. Co.*, 36 Geo. 51; *Engle v. Shurtz*, 1 Mich. 150; *Cole v. Madison County*, Breese, 115; *Parmelee v. Lawrence*, 48 Ill. 331;

in which the doctrine has been denied, that no individual can have in a statutory penalty any vested right which the legislature would be precluded from taking away, or which would remain after the statute under which it was claimed had been repealed.

In some of the cases which have been referred to, that which the statute permitted to be recovered, or which was forfeited under it, was not designated a penalty, but, as in the fugitive slave case, assumed the form of, or was intended as, compensation to a party for a wrong done or injury suffered by him. One of the cases in Maine was of this description. The statute entitled the plaintiff, in case of the breach of a prison bond given by his debtor, to recover in a suit upon it the amount of his debt, costs; and expenses, with twenty-five per centum interest. Obviously this would exceed the damages suffered by him, and might be very greatly in excess. A later statute repealed this, and substituted a recovery of the actual damages the creditor had suffered, to be estimated by a jury. This recovery, it was held, was all that the creditor could demand, though the breach had occurred previously. All that the first statute gave in excess of the actual damages was in the nature of a penalty, whether so denominated or not, and the control over it did not depend on what it was called.⁵

Other cases involved the validity of statutes which mitigated the penalties against usury, and of these the same view was taken.⁶ If a party promises to pay usury, it is only by the favor of the law that any special remedy or protection is given him, and he can have no special claim to—certainly no vested right in—a favor which, at the same time, is a punishment to his creditor.

Where the penalty is taken away by statute, it seems to be immaterial that a suit has been previously commenced for the

Chicago etc. R. R. Co. v. Adler, 56 Ill. 345; People v. Livingston, 6 Wend. 526; Thompson v. Bassett, 5 Ind. 535.

⁵ Oriental Bank v. Freeze, 18 Me. 107, citing Potter v. Sturdevant, 4 Me. 154.

⁶ Wilson v. Hardesty, 1 Md. Ch. Dec. 66; Parmelee v. Lawrence, 48 Ill. 331; Engle v. Shurtz, 1 Mich. 150; Curtis v. Leavitt, 15 N. Y. 9; Welch v. Wadsworth, 30 Conn. 149; Wood v. Kennedy, 19 Ind. 68.

recovery of the penalty. This is on the ground that the court, in rendering a decision, can only apply the law which is then in force.⁷ And this rule applies even on appeal, though the judgment appealed from may have been rendered before the law was changed.⁸ There is, indeed, a case in New York which seems to be opposed to this view. In that case a tenant had incurred a forfeiture by removing property from the demised premises to avoid a distress for rent, and a judgment was recovered against him for the statutory penalty. He appealed, and, pending the appeal, the legislature abolished the remedy by distress, but without in express terms abolishing the penalty. Jewett, J., in passing upon the case in the supreme court, says: "At the instant the thing was done for which the penalty was given, it became a debt or duty, vested in the plaintiff. It is in the nature of a satisfaction to him, as well as a punishment of the offender.⁹ The plaintiff having acquired a vested right to the penalty, the statute abolishing the right of distress, subsequently passed, which did not in terms repeal the section in question, in no way affects that right."¹⁰

With great respect, it seems to us that the learned judge begs the question when he assumes that a vested right was acquired in the penalty. Certainly there is a great weight of judicial authority against this view. But he may have been right in attaching importance to the fact that the provision which gave the penalty was not expressly repealed.

⁷ *Schooner Rachel v. United States*, 6 Cranch, 329; *Yeaton v. United States*, 5 Cranch, 281; *United States v. Passmore*, 4 Dall. 372; *Norris v. Crocker*, 13 How. 429; *Confiscation Cases*, 7 Wall. 484; *United States v. Tyner*, 11 Wall. 88; *Satterlee v. Mathewson*, 16 S. & R. 169, and 2 Pet. 580; *Maynes v. Moore*, 16 Ind. 116; *Bacon v. Callendar*, 6 Mass. 303; *Cowgill v. Long*, 15 Ill. 203; *Butler v. Palmer*, 1 Hill, 324; *Commonwealth v. Leftwich*, 5 Rand. 657; *Commonwealth v. Welch*, 2 Dana, 330; *State v. Squires*, 26 Iowa, 340; *Mather v. Chapman*, 6 Conn. 54; *Engle v. Shurtz*, 1 Mich. 150; *People v. Herkimer Com. Pl.*, 4 Wend. 206; *McMinn v. Bliss*, 31 Cal. 122.

⁸ *McCardle's Case*, 7 Wall. 506; *Bristol v. Supervisors*, 20 Mich. 95; *Ludlow v. Jackson*, 3 Ohio, 553; *State v. Norwood*, 12 Md. 195.

⁹ *Citing Company of Cutlers in Yorkshire v. Ruslin, Skinner*, 363; *Grosset v. Ogilvie*, 5 Brown P. C. 527; *College of Physicians v. Harrison*, 9 B. & C. 524.

¹⁰ *Palmer v. Conly*, 4 Denio, 374.

True, it would become inoperative as to future cases when the remedy by distress was taken away, but there was nothing inconsistent in taking away that remedy and still leaving the penal provision applicable to the cases that would come within it; that is to say, to the cases that previously had occurred. On this ground the case may, perhaps, be harmonized with those decided in other courts.

2. *Cases where Statutes are Repealed with Saving of Rights Accrued.*—But while it is entirely competent to take away statutory penalties after they have accrued, it is also competent, by the proper clause in the repealing statute, to save them. This is often done; the effect being to continue in force, for the purpose of recovering the penalty, the statute which gave it.¹¹

3. *Cases where Laws are Repealed which Forbade Particular Contracts.*—These cases present more difficulties than those already considered, and there has not often been occasion to pass directly upon the effect of a repeal where the repealing statute contained no express provision on the subject of the previous invalid contracts. It might be urged with some plausibility that if the contracts were such as the common law would have sanctioned, and which, therefore, would have been valid but for the statute, the repeal of the statute, thereby removing everything which constituted an impediment to their validity, must leave them subject to the rules of the common law, and, therefore, enforceable. An illustration may be taken from the prohibitory liquor laws, so called. These laws, in general, forbid the making of certain contracts which, at the common law, would have been perfectly legal and valid. Remove the statute, and what impediment remains to the enforcement of such a contract? All the elements of a recovery then exist—an agreement of minds and a consideration—and nothing is in the way, unless it be the statute which has now been repealed. Has the dead statute vitality for any such purpose? But, on the other hand, the condition of things at the time the statute

¹¹ The Irresistible, 7 Wheat. 551; Broughton v. Branch Bank, 17 Ala. 828; People v. Gill, 7 Cal. 356; Cochran v. Taylor, 13 Ohio N. S. 382.

was repealed cannot be ignored. If there was then no contract, how can the repeal of the statute bring a contract into existence? The general rule unquestionably is, that a negotiation between parties must depend for its validity and construction upon the law in force at the time when, and the place where, it was executed. This is so even where the remedy is pursued in another jurisdiction; the tribunal which is called upon to enforce rights under it ascertains what those rights are by enquiring what force and effect was given to the contract by the law of the place at the time of contracting. This is elementary. If, therefore, that law utterly forbade any contract of the nature of that which is relied upon, it is not perceived how any change in the law, which simply removes an impediment to enter into a contract, could impart vitality to a void negotiation, any more than it could import new terms into a valid agreement. If there was no contract while the law was in force, there remains none after it was repealed. This seems plain.¹²

It is possible, however, that the terms of the statute which preclude a recovery may have something to do with the effect of the repeal. If the statute forbade any contracts, its repeal, as already stated, can create none. But if, on the other hand, the statute only permitted a certain defence to be made to a contract, there would at least be plausibility in an argument that, when the statute which gave the defence was taken away, the contract remained and would be enforceable. The distinction is a somewhat nice one, and it would not be safe to act upon it without satisfactory evidence in the statute itself that its purpose was not to make all contracts of the kind absolutely null and void, but rather to give a defence as a privilege. Such a privilege could only become available when suit was brought; and if before that time the law which gave it was taken away, the privilege would be gone. But a void contract must be treated as invalid whenever the facts which constitute its invalidity are brought to the attention of the court.

The question of the legislative right to make valid an agree-

¹² See *Milne v. Huber*, 3 McLean, 212.

ment which, by the law under which it was made, was invalid, would seem to be now so conclusively determined as not any longer to be the subject of discussion. The right has been affirmed in a great variety of cases, and the argument that, in validating the invalid agreement, the legislature is in effect making for the parties a contract where no contract existed before, has almost invariably been put aside as unsound. The legislature, it is said, is only furthering the apparent design and purpose of the parties when it removes the statutory impediment to the validity of their arrangements, and gives them legal effect. It can wrong no one to remove a legal bar to the accomplishment of that which he has attempted.

A leading case on this point was that in which the Supreme Court of Pennsylvania affirmed the right of the legislature to validate one of the Connecticut leases of land in that Commonwealth, which the courts had previously declared, as a result of state legislation on the subject, were void, and could not create the relation of landlord and tenant. The legislature subsequently, by declaratory act, affirmed the validity of such leases, and of the relation of landlord and tenant under them. This presented very squarely the question of legislative power, which is above suggested, and it was squarely met by the court in an able opinion, often since that time followed in that and other states.¹³ In this case the legislation was attacked as destructive of vested rights, and as violating the obligation of contracts. It certainly violated no vested rights, unless an inequitable defence could be held to be one, for a defence against a fair contract must always, so far as the party himself is concerned, be inequitable.¹⁴ Neither did it violate the obligation of contracts.

¹³ *Satterlee v. Mathewson*, 16 S. & R. 169. For other Pennsylvania cases affirming the same principle see *Walton's Lessee v. Bailey*, 1 Binn. 477; *Haas v. Wentz*, 4 S. & R. 361; *Underwood v. Lilly*, 10 S. & R. 101; *Barnet v. Barnet*, 15 S. & R. 72; *Tate v. Stooltzfoos*, 16 S. & R. 35; *Bleakney v. Bank of Greencastle*, 17 S. & R. 64; *Menges v. Wertman*, 1 Penn. St. 218; *Journeay v. Gibson*, 56 Penn. St. 57.

¹⁴ See *Foster v. Essex Bank*, 16 Mass. 245; *Welch v. Wordsworth*, 30 Conn. 149.

Its purpose, on the other hand, was to perfect the contract and do away with the difficulty in its enforcement.¹⁵ We cannot give the facts of other cases, many of which are equally strong and pointed; nor is it at all necessary when the principle is so firmly settled. Some further cases affirming it are given in the note.¹⁶

In all these cases it is to be understood that the statute not only removes the legal impediment which before existed to a lawful contract, but it expressly assumes to validate the contracts attempted before. The question, therefore, does not arise on a mere repealing statute, and, consequently, the cases do not conflict with what has above been said—that a repealing statute leaves previous invalid arrangements in the same state of invalidity in which it found them. But this is not a necessary result; the legislature may retrospectively affirm that which would have been valid but for the statute repealed, provided that, in express terms, they declare their purpose to that effect. There are, indeed, certain limitations upon their power; it is generally conceded that they cannot retrospectively, by their affirmance of a contract, divest rights which have been acquired in reliance upon its invalidity;¹⁷ nor could they validate a contract obtained by fraud or duress, or from an insane person.¹⁸ These are very plain exceptions to the general power; they rest upon

¹⁵ *Satterlee v. Mathewson*, 2 Pet. 380. See *Watson v. Mercer*, 8 Pet. 88; *Carpenter v. Pennsylvania*, 17 How. 456.

¹⁶ *Lewis v. McElvain*, 16 Ohio, 347; *Johnson v. Bentley*, *ibid.* 97; *Chestnut v. Shane's Lessee*, 16 Ohio, 599; *Trustees v. McCaughy*, 2 Ohio N. S. 152; *Goshen v. Stonington*, 4 Conn. 209; *Beach v. Walker*, 6 Conn. 190; *Norton v. Pettibone*, 7 Conn. 319; *Savings Bank v. Allen*, 28 Conn. 97; *Bass v. Columbus*, 30 Geo. 845; *Winchester v. Corina*, 55 Me. 9; *Andrews v. Russell*, 7 Blackf. 474; *Grimes v. Doe*, 8 Blackf. 371; *Maxey v. Wise*, 25 Ind. 1; *Boyce v. Sinclair*, 3 Bush, 264; *Payne v. Treadwell*, 16 Cal. 220; *Deutzel v. Waldie*, 30 Cal. 138; *Sticknoth's Estate*, 7 Nev. 227; *Harris v. Rutledge*, 19 Iowa, 389; *Gibson v. Hibbard*, 13 Mich. 215; *State v. Norwood*, 12 Md. 195.

¹⁷ *Greenough v. Greenough*, 11 Penn. St. 489; *Southard v. Railroad Co.*, 2 Dutch. 22; *Brinton v. Seevers*, 12 Iowa, 389; *Sherwood v. Fleming*, 25 Texas, 408; *State v. Warren*, 28 Md. 338.

¹⁸ *White Mountains R. R. Co. v. White Mountains R. R. Co. of N. H.*, 50 N. H. 50; *Routson v. Wolf*, 35 Mo. 174.

rules of right, the force of which is universally felt and conceded. The contract of a married woman, however, or of an infant, entered into after he had arrived at an age when only the statutory impediment could stand in the way of his acting independently, might, as we think, be validated.¹⁹

What has above been said is applicable not only to cases of contracts forbidden, and to those which have been executed by parties while laboring under legal disabilities, but also to contracts which are required to be made under particular formalities, and are invalid because the formalities are not complied with.

4. *Cases in which a Change in the Policy of the Law might Affect Contracts.*—The cases are numerous in which contracts are held to be invalid because they contravene some general policy of the state. This policy may be declared or established by statute, or it may result from the common law as it is accepted and enforced in the state. It is now a rule of general acceptance that, whenever a thing is forbidden by statute, it is illegal to do it, and any contract having in view to circumvent and defeat the purpose of the statute is also illegal, and, therefore, void.²⁰ Nor need the prohibition be direct; it is sufficient that the statute has in view a purpose which it undertakes to accomplish, and that the contract is either designed to defeat that purpose, or will tend naturally to do so.²¹ Therefore a contract, the object of which is to evade the revenue laws of the country, or a contract originating in a business transaction on Sunday, when such transactions are forbidden, are as much void when not directly so declared as when they are.²² And the

¹⁹ See *Chestnut v. Shane's Lessee*, 16 Ohio, 599; *Goshorn v. Purcell*, 11 Ohio N. S. 641; *Dulany's Lessee v. Tilghman*, 6 G. & J. 461; *Walton's Lessee v. Bailey*, 1 Binn. 477; *Journey v. Gibson*, 56 Penn. St. 57.

²⁰ *Bartlett v. Vinor*, Carth. 252; *s. c.*, *Skinner*, 322; *Drury v. Defontaine*, 1 Taunt. 136; *Fowler v. Scully*, 72 Penn. St. 456; 1 Pars. on Cont. 457-459.

²¹ *O'Hara v. Carpenter*, 23 Mich. 410.

²² 2 Pars. on Cont. 753, 757, and cases cited. There are, of course, exceptions to this as to all other rules. If a statute imposes a penalty for the doing of a certain act, and it seems to be the intention, in passing it, that the payment of the penalty shall be the sole liability for the doing of such act, the act itself may be valid. *Pangborn v. Westlake*, 36 Iowa, 546.

rule is the same where the infirmity in the contract is because of its contravening some general principle of the common law. An immoral contract, a contract which tends to corrupt legislation, a contract in general restraint of marriage, a champertous contract—all these are incapable of enforcement for the reason above assigned.²³ And as such contracts would be unlawful in their inception, it is not believed that a statutory change in the policy of the state, effected by legislation after such contracts had been entered into, would render them susceptible of enforcement. If they were not contracts when the legislation was enacted, doing away with the cause of the invalidity would not impart life to them. The cause had accomplished the mischief before. The repeal of a statute of limitations does not revive a cause of action previously barred by it, and the principle would seem to apply in all cases where an agreement of parties is, for any reason, incapable of enforcement. If originally invalid, it is not called into existence as an effective engagement by removing, *ex post facto*, that which precluded its being formed; if once valid, and afterwards put an end to, it cannot be revived by removing that which had destroyed it.

But the question might still remain, whether an express legislative recognition of contracts, originally invalid for repugnancy to some rule of public policy, might not give them legal force? Suppose, for example, a contract void because in restraint of trade; what principle should preclude its being retrospectively validated, that would not be equally applicable to a contract invalid because expressly prohibited by law? In either case the legislature would be giving effect to the manifest purpose of the parties, in entering into the agreement, by removing the impediment which they had encountered. Indeed, the reasons for interference would commonly be stronger in those cases than in the case of contracts rendered invalid by statute; for public policy, in its application to contracts, is not always so clear and distinct as to apprise parties with reasonable certainty what compacts they may, and what they may not, make; and

²³ Pothier on Obligations, 1-9; 2 Pars. on Cont. 747.

those which are entered into in perfect good faith are sometimes held invalid because opposed to a public policy which the parties themselves failed to comprehend. The illustration of contracts in restraint of trade is very pertinent here. It is utterly impossible for any one to determine at this time, from the reported cases, how far the old common law on this subject is now in force. That it is greatly modified, in the changed circumstances of this country, may be safely affirmed in the light of the most recent decisions;²⁴ and it would seem not only an act warranted by law, but by sound reason and good morals, to put at rest the questions relating to such contracts as far as possible—not only for the future, but for existing arrangements also. If it is allowable to validate a contract which the statute at the time would not sanction, still more certainly ought it to be to affirm one only forbidden by some vague and uncertain rule of public policy, respecting the existence of which even an expert might reasonably be in doubt. Indeed, where the policy itself had been growing fainter and more uncertain in the lapse of time, as it has in the case referred to, until even the courts are in doubt whether it should be recognized at all, a legislative declaration that it should no longer be recognized might possibly be held to be evidence that the policy itself had previously disappeared, so that courts might feel at liberty to enforce previous contracts entered into in good faith, and which, if made since the legislation, would be plainly and unmistakably legal.

The repeal of a law which forbade certain contracts might possibly raise questions of the right to recover back that which had been paid upon, or received in consideration thereof. If a contract is illegal, and something has been given for or done under it, the general rule of law is that the courts will not interfere to aid either party. If they have engaged in an unlawful negotiation, and one has suffered in consequence, the law will not undertake to relieve. The law cannot concern itself with a settlement of equities growing out

²⁴ *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64; *Schwalm v. Holmes*, 49, Cal. 665; *Beal v. Chase*, 31 Mich. 490.

of a transaction in which, by reason of their disobedience of law, none of the parties have any claim to consideration. Possibly an exception might be made to this rule in cases where to interfere might be the most likely means of making the law respected in the future, and where not to interfere would only encourage future disobedience.²⁵ And sometimes it is expressly provided by statute that whatever is received on a specified illegal transaction shall be deemed to be received without consideration, and may be recovered back. Of such a statute there might possibly be room for saying that it was penal in its nature, and its repeal took away the right of recovery it gave. But as it only provides that one shall have back what another has unlawfully obtained from him, there would be at least equal reason for saying that it could fairly be called a remedial statute. The right under it would be a right to recover money had and received by the defendant to the plaintiff's use—a right sounding in contract; and, in general, such rights, when they once accrue, are not to be affected by the mere repeal of the statute, or the change in the common law under which they arise.

5. *Cases where Statutes undertake to give a New Defence to Contracts.*—The general rule of law which requires statutes to be so construed as to apply prospectively only, unless by their terms a retrospective effect is clearly intended, would prevent the statutes here referred to applying to existing contracts where a purpose to that effect is not explicitly declared or plainly evidenced by the statute. Supposing such a purpose to be apparent, the question will remain, how far it is competent to give it effect. In certain cases it is unquestionably admissible; in others it is not in the power of the legislature to authorize that to be accepted as a defence to a contract which was not such when the contract was entered into. The distinction between the two classes of cases would seem to be this: If the new defence would

²⁵ Compare *Adams v. Gay*, 19 Vt. 358; *Smith v. Bean*, 15 N. H. 577; *Tucker v. Mowrey*, 12 Mich. 378; *Sumner v. Jones*, 24 Vt. 317; *Dodson v. Harris*, 10 Ala. 566; *Myers v. Meinrath*, 101 Mass. 366; *Holman v. Johnson*, 1 Cowp. 343; *Waymell v. Reed*, 5 T. R. 599.

defeat a contract previously valid, or take away any right assured to the party by it, then the defence could not be allowed, for it would come within the prohibition of that clause of the constitution of the United States which forbids the states passing laws which impair the obligation of contracts. But if the new defence only presents legal objections in some new way, or is designed only to make available an existing equity, the provision for it should be regarded as affecting the remedy only, and for that reason competent and admissible. But it is admitted that this classification is not very exact; for a contract may possibly be legal, and yet opposed to some plain equity which the law ought to recognize, if it does not. Whether a defect in the law in this regard may not be remedied, and the amended law applied to existing arrangements, will be considered further on.

Of the cases in which new defences have been held not admissible, we may refer to those relating to slave contracts, which were entered into while slavery was lawful and enforced afterwards, notwithstanding positive legislative or constitutional enactments declaring that it should be admissible to show in defence what was the consideration, and that it should constitute a complete defence. Remembering that the whole policy of the country had been changed by the constitutional declaration of the illegality of slavery, it would seem that if any class of contracts could be declared invalid in consequence of the subsequent legislation, then these must certainly be. If made now, they would not only be declared invalid on constitutional grounds, but also because, to sustain them at all, positive law would be required. Slavery rests upon positive law, and cannot exist independent of it. Nevertheless, such contracts entered into while such positive law existed must be enforced. We may think them unwise, impolitic, immoral if you please, but the law recognizes them now because it did so when they were made. The new defence, which would import into them an infirmity not then recognized, cannot be admitted.²⁶

But it is familiar law that remedies are always under leg-

²⁶ *White v. Hart*, 13 Wall. 646; *Osborn v. Nicholson*, *ibid.* 654.

islative control, and may be changed at will, provided the change does not go to the extent of depriving the one party of substantial redress, or of fastening upon the other some new obligation.²⁷ In the exercise of this legislative control it is often deemed just and proper that new defences be given in order to work out more perfectly, by means of them, the real equities of the parties. If this is all that is sought, it cannot be inadmissible. A technical rule of law may be removed where only injustice would result from its enforcement. A legal defence may be allowed where only an equitable defence existed before. A set-off, or recoupment, may be substituted for a cross-suit, and so on. Nothing of this nature violates the obligation of contracts. It is only in the direction of giving a reasonable and just effect to contracts, and the policy of the law would favor rather than forbid it. To give more complete and effectual defences, so long as they only bring out the just rights of the parties, is no more unjust, nor, as we believe, more unwarranted, than to take away merely technical or inequitable defences. In either case, justice is promoted, and no rights entitled to protection are violated.²⁸

On this branch of our subject, reference may be made to some early cases in Massachusetts. It was decided by the supreme court of that state that a prisoner within the jail limits was not at liberty to enter upon the premises of private individuals, though they were within the prison bounds, and that a breach of his bond for the jail limits was committed if he did so. Subsequently the legislature changed the law in this regard, and enacted that no person, having

²⁷ That a statute is void which takes away all remedy is a principle that would seem to require no support from authorities. A few are referred to. *Call v. Hagger*, 8 Mass. 423; *Bruce v. Schuyler*, 4 Gilm. 321; *West v. Sansom*, 44 Geo. 295; *Coffman v. Bank of Kentucky*, 40 Miss. 29; *Jacobs v. Smallwood*, 63 N. C. 112; *Hudspeth v. Davis*, 41 Ala. 389; *Griffin v. Wilcox*, 21 Ind. 371; *Rison v. Farr*, 24 Ark. 461; *McFarland v. Butler*, 8 Minn. 116.

²⁸ *Hope v. Johnson*, 2 Yerg. 123; *Brandon v. Green*, 7 Humph. 130; *Lewis v. McElvain*, 16 Ohio, 347; *Bolton v. Johns*, 5 Penn. St. 145; *Sunderland v. De Leon*, 1 Texas, 250; *Steamboat Co. v. Barclay*, 30 Ala. 120; *Cutts v. Hardee*, 38 Geo. 350.

given bond for the liberty of the yard, should be considered as having committed an escape in consequence of having entered into or upon any private estate or property lying within the limits of such jail-yard. In suits subsequently brought, the court applied this statute to breaches which had previously occurred.²⁹ We should say of these cases that they go to the very extreme limit of what is admissible, for they *seem* to change the legal effect and obligation of the contract itself, and to render that not a breach which was a breach when the contract was entered into. It is to be observed, however, on an examination of the cases, that the reasons for the passing of the act were the doubt which had existed on the subject before, and the fact that parties had passed the prison limits in the full belief that the law permitted what they were doing, and without any intention to violate their contract. There was, therefore, in their cases something in the nature of mistake; of law, it is true, rather than of fact; but a mistake of law always presents some claim to equitable consideration, and it may be deserving of serious reflection whether to permit relief in cases of such mistakes would not be fairly within the competency of the legislature under principles already recognized. The reasons for permitting equity to relieve against mistakes of fact, but not against mistakes of law, are not very plain to the common apprehension, and cases often occur which it would seem just to make exceptions.³⁰

We have referred to the statute of limitations as cutting off rights under contracts. It is a general and very just rule that new conditions cannot lawfully, by legislation, be imported into contracts;³¹ but reasonable regulations are always admissible, even though they might result in a loss of remedy when not complied with. A statute of limitations would come under this head; so would a provision for the compul

²⁹ *Walter v. Bacon*, 8 Mass. 468; *Patterson v. Philbrook*, 9 Mass. 151; *Locke v. Dane*, *ibid.* 359. Compare with these *Fisher v. Cockerill*, 5 T. B. Monr. 122; *Lewis v. Brackenridge*, 1 Blackf. 220.

³⁰ That new defences may be made available in suits pending when they were provided for, see *U. S. Bank v. Longworth*, 1 McLean, 35.

³¹ *Robinson v. Magee*, 9 Cal. 81.

sory registry of deeds and other like instruments. Possibly such provisions might be so unreasonable as to require the courts to declare that they took away rights under pretence of regulating them; but we speak of those cases where the regulations are such in fact, and not in pretence merely.

6. *Cases of New Recognition of Rights where there has been Wrongful Action.*—From time to time the law of torts is changed, and remedies given where none existed before. It is not customary to make legislation of this character retrospective, and the right to do so is sufficiently questionable to justify its not being attempted. But it would also be impolitic in a high degree. It might possibly not be held to come within the technical definition of *ex post facto* legislation, but, in substance and effect, it would differ from it so little that a court might well hesitate to enforce it. The question of the right to provide for and recognize new defences in the case of wrongs previously committed would be different. It might not be admissible to make an act a tort which was not so when done, but it might be perfectly just to allow a tort previously committed to be mitigated by all those circumstances which would in any way tend to excuse it, or to relieve the responsible party from any of the consequences.

We have always believed that when the question of the power of the legislature to narrow, qualify, or take away, rights of action was in question, too much importance was usually attached to the circumstance that the right did or did not arise out of contract. True, the federal constitution undertakes to defend contracts only; but did they really need this defence? Would they not, on general principles of constitutional law universally recognized in this country, be inviolable by legislative authority, whether expressly guarded as they now are or not? The question may not now be of practical importance, but it is not perceived how the legislature could be powerless to take away a man's horse, and yet competent to confiscate his commercial paper. The one is property as well as the other. And where a right of action results from the principles of the common law, and has once

become fixed and vested, it would seem that this also should be considered inviolable on the same reasons.³² We use the word "contract" here in its ordinary sense, as the framers of the constitution doubtless did also. Of chartered rights we have no occasion now to speak.

But there are some defences in the case of torts that are not wholly reasonable, and that often operate unjustly. An instance may be taken of the rule that a party who has suffered by reason of the negligence of another shall not be allowed to recover if his own negligence directly contributed to the injury. On public grounds the rule may be wise, but it very often works gross injustice. If two parties are alike negligent, and the whole injury has chanced to fall upon one, there is no just reason, when we consider the cases of the two parties, why the other should not be compelled to share the loss with him. The courts of admiralty require this, and the courts of some other countries apportion the loss as best they may be able under all the circumstances. Suppose the legislature to require our courts of common law to do so, and apply the new rule to previous transactions; what would be the ground of complaint? Only, as we should suppose, this: that taking away the defence was really creating a new right of action. It purports to affect the remedy, but it really gives a right; it is an indirect method of accomplishing an inadmissible result. Legislation may not create torts; but to limit by statute the recovery for torts to what is just and right, as between the parties, wrongs no one, even though the recovery be based upon transactions which took place before the statute was adopted.

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³² See *Griffin v. Wilcox*, 21 Ind. 370; *Hubbard v. Brainerd*, 35 Conn. 563; *Bryan v. Walker*, 64 N. C. 146. Compare *White v. Hart*, 13 Wall. 646.

IV. A BRACE OF NOTED CASES; *Namely, STOKES'S CASE AND TWEED'S CASE.*

I. INTRODUCTION. II. STOKES'S CASE. III. TWEED'S CASE.

I. Introduction.—Among cases which have agitated both the professional and general public during recent years, there are few more prominent than the two named at the head of this article, both decided by the New York Court of Appeals. I do not propose to enter into any popular views of either,—the history of each, I presume, is familiar to every reader,—consequently I shall limit myself to some consideration of the more prominent questions of law involved in each.

II. Stokes's Case.—This case was decided in 1873.¹ There were several questions in it, but the prominent one, of which alone I am to speak, is the following:

The indictment against Stokes was for murder. A statute divided murder into degrees, and the jury found him guilty of murder in the first degree; "perpetrated," as the statute expresses it, "from a premeditated design to effect the death of the person killed, or of any human being." Some confusion of ideas seems to have prevailed at the trial; but the judge gave an instruction to the jury which was interpreted as equivalent to telling them, that, from the mere fact of killing, which was substantially admitted, the jury should infer the "premeditated design to effect the death," and return a verdict of guilty in the first degree; unless the defendant, by his proofs, satisfied them to the contrary. The Court of Appeals held that this instruction was wrong.

Plainly the instruction was a mere blunder, such as will sometimes occur on a trial presided over by the most careful of judges. It arose from an accidental failure to distin-

¹ Stokes v. People, 53 N. Y. 164.

guish the question before the jury, under the statute, from the familiar one at common law, where, by perhaps the majority of judges, it is held that, from a mere killing, or a mere intentional killing, the malice which constitutes murder is, *prima facie*, to be inferred. But where a statute, as in New York and some other of our states, goes further, and divides murder into two degrees, no court ever held that murder in the first degree is to be inferred from the killing alone; the utmost stretch of the presumption having been that it is murder in the second degree. This question could never arise in England, because murder in the first degree is there unknown; but in several of our states it has been agitated, the decisions are all one way, and there is no doubt upon it.* The notable thing about this case, as a mere legal one, is, that many people, even among lawyers, thought, at the time, that the court had in some way been induced to bend the law in the interest of the crime of murder.

III. Tweed's Case.—As many hard things, now happily passed away, were at first said about the decision in Tweed's case, it would be gratifying could we find that it also accords with the general law, as administered in England and our other states. But it does not. Unquestionably it is law in New York, for it is the decision of the court of last resort. Nor do I even suggest that the tribunal erred therein. In other localities, where the common law prevails, to accept it would be to overturn what is fundamental and established in authority, and in principle is essential to the just administration of the criminal law.

This case is entitled *People ex rel. William M. Tweed v. Liscomb*; the latter being the warden of the prison in which Tweed was confined, and the proceeding being *habeas corpus*. It was decided in 1875.³ The facts were as follows:

A statute provided, that, "when any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every wilful neglect

* 2 Bishop Crim. Proced. 2d ed. § 618; *Witt v. The State*, 6 Coldw. 5; *The State v. Holme*, 54 Misso. 153, 161.

³ *People v. Liscomb*, 60 N. Y. 559.

to perform such duty" should be a misdemeanor, punishable by imprisonment not more than a year, and a fine not exceeding two hundred and fifty dollars. Tweed had been indicted for two hundred and twenty distinct and several neglects under this statute, in one indictment, in as many separate counts, and had been found guilty on two hundred and four of the counts. Upon twelve of the counts the court had sentenced him to twelve successive terms of imprisonment of one year each, together with fines of two hundred and fifty dollars on each, and, on other counts, to additional fines, amounting in all to twelve thousand five hundred dollars. After the expiration of one year's imprisonment, and the payment of one fine of two hundred and fifty dollars, this writ of *habeas corpus* was brought, on the idea that the sentence upon one count exhausted the jurisdiction of the court, and the sentences on the other counts were void. It was denied, on the part of the People, that *habeas corpus* was the proper remedy, which, it was said, should have been a writ of error. That question I do not propose to discuss, but the other. The court held that the entire judgment subsequent to that on the first count was void, and the prisoner was entitled to his discharge.

The ground of the decision on this main issue was, that neither in felony nor in misdemeanor is it competent for a court to try a man for two or more separate offences, charged in one indictment, though in separate counts, and inflict on him a punishment greater than the law would permit on one of the counts. The only course to this end, even in the minor misdemeanors, is, it was held, for a separate indictment to be found for each offence, to be followed by a separate trial thereon.

And this course, it was deemed, is invariably essential for the protection of defendants. "The practice," said the learned judge, "of putting a man on trial for distinct offences at the same time is fraught with danger to the accused, and can never be done except at great risk of doing injustice. The law is tender of the rights of those accused of crime, to the extent of securing to them, by every means, a fair and

impartial trial by a jury of the country, and protecting them against a conviction under the forms of law, but without an observance of, and adherence to, all the forms and rules of law calculated to protect the innocent."⁴ Now, in this case, Tweed was, in law, innocent, and should be deemed so also in morals, until proved guilty. The humane course, therefore, was to find against him two hundred and twenty separate indictments, and permit him to fee counsel, and pay witnesses, and overcome the People's evidence against him two hundred and twenty times. How long a period must be occupied in doing this it is impossible to calculate with certainty, but a very low estimate would be ten years of continuous defence. Meanwhile an extra court-house must be built, and an extra judge commissioned. But this burden would be for the People; Tweed would have burden enough to bear of his own.

Contrary to this view, the general doctrine prevailing elsewhere is, that the justice of the law forbids the harassing of defendants with multitudes of suits, whether criminal or civil, where the matter can be properly condensed into one. Such a course, even as to civil claims justly due, will in some circumstances subject him who pursues it to indictment at the common law.⁵ There are limits within which causes of action may be divided and prosecuted in different suits, and limits beyond which the party will not be permitted to go in that direction. Some civil claims are so diverse in their nature that they can be enforced only in separate suits.

The forms of the criminal law differ from those of the civil department; yet, in the criminal, the general truth just stated prevails the same as in the civil, though with perhaps less protection against multitudes of prosecutions. If a grand jury should find many indictments for petty offences growing out of one series of facts, where the whole could be more conveniently embraced in separate counts of one indictment, doubtless it would be competent for the court to order the whole to be tried together. And it may be that the court

⁴ Page 581.

⁵ *Commonwealth v. McCulloch*, 15 Mass. 227.

might even be justified in refusing to try one of the indictments, or in quashing all, should the prosecuting power decline condensing the whole into one. This would furnish to the defendant a sort of protection against an interminable harassment. Or, on the other hand, should the prosecuting power in the first instance manifest its wish to try two distinct offences together by charging both in one indictment, in separate counts, then, should the defendant object to this, and the court be satisfied that it would work injustice to him, it could order separate trials on the separate counts;⁶ or it could quash a part of the counts;⁷ or, after the case was opened to the jury, it could require the prosecuting officer to elect on what count, or for what criminal transaction, he would proceed.⁸ In cases of felony the practice prevailing in most localities is, as a matter of course, to confine the prosecutor to evidence of a single criminal transaction, if the prisoner so requests; but in misdemeanors the court will exercise this power or not, according to the circumstances and demands of justice in the particular instance;⁹ yet neither in felony nor in misdemeanor is there any inexorable rule of law forbidding the joining of counts for separate felonies, or for separate misdemeanors, or for misdemeanor and felony, in one indictment. Each count is, in effect and in form, a distinct indictment; and an indictment in a half-dozen counts, and a half-dozen indictments in one count each, differ in little, if anything, except in this, that to the former there is only one caption, with one endorsement by the foreman of the grand jury, while to the latter there are six captions (if the indictments are certified to a higher court), with six endorsements. In neither case is the existence of one count or indictment pleadable in bar or in abatement of another.¹⁰ The consequence of which is, that, alike in felony and misdemeanor, in cases in which an election would be enforced if

⁶ *Commonwealth v. Hills*, 10 Cush. 530, 534.

⁷ 1 *Bishop Crim. Proced.* 2d ed. §§ 447, 455.

⁸ *People v. Baker*, 3 Hill (N. Y.), 159; *Reg. v. Fussell*, 3 Cox C. C. 291; 1 *Bishop Crim. Proced.* 2d ed. § 454, *et seq.*

⁹ 1 *Bishop Crim. Proced.* 2d ed. §§ 457, 458.

¹⁰ 1 *Bishop Crim. Law*, 6th ed. § 1014.

asked, and those in which it would not, if the jury convicts the prisoner for more offences than one, charged in separate counts, the finding and the record are nevertheless good on a motion in arrest of judgment or on a writ of error;¹¹ *a fortiori*, therefore, good on a proceeding by *habeas corpus*.

Whatever may be said of felony, there is no proposition better established as general doctrine, or less embarrassed by dissenting views, than that, under proper circumstances, separate and disconnected misdemeanors may be charged in distinct counts in one indictment, and the defendant be convicted for the whole. The authorities to this proposition could be multiplied almost without end, and nothing could be found against it.¹² And this doctrine appears to prevail as well in New York¹³ as elsewhere. I do not understand the court, in Tweed's case, distinctly to deny this proposition, which they say is sustained by "a show of authority."¹⁴ But what they maintain, and what this case establishes as the law of New York, is, that, though there be such a conviction, no heavier judgment can be passed on the whole indictment than the law permits on one of the counts; and, if the court imposes the full legal penalty on one of the counts, any judgment it pronounces on the rest is void. This, I admit, is New York law; but it was never law anywhere else, and let us hope that it may not be hereafter. How could it be law elsewhere? Why, in any civilized community, should a court spend its time, merely to spread scandal, in convicting a man of an offence, if it had no power to punish him therefor? The end of the proof of crime, and the verdict of

¹¹ 1 Stark. Crim. Pl. 39; Rex v. Kingston, 8 East, 41; United States v. Stetson, 3 Woodb. & M. 164; The State v. Nelson, 14 Rich. 169; The State v. Brown, Winston, No. 2, 54; Henwood v. Commonwealth, 2 Smith (Pa.), 424; Ketchingman v. The State, 6 Wis. 426; The State v. Kibby, 7 Misso. 317; People v. Shotwell, 27 Cal. 394; together with many other authorities.

¹² For example, 1 Bishop Crim. Proced. 2d ed. §§ 448, 452, and the cases there cited; The State v. Gummer, 22 Wis. 441; The State v. Tuller, 34 Conn. 280.

¹³ People v. Costello, 1 Denio, 83, 90; Kane v. People, 8 Wend. 203; People v. Rynders, 12 Wend. 425; People v. Gates, 13 Wend. 311; People v. Baker, 3 Hill (N. Y.), 159; Hodgman v. People, 4 Denio, 235.

¹⁴ Page 577.

guilty, in a court, is, in other localities, punishment; and the proposition that the tribunal will proceed to the verdict involves, in other localities, the further proposition that it will take the final step to the sentence.

The court, in this case of Tweed, seems, by implication, to admit that, if there is a discretion as to the punishment, and it is divided among the different counts which charge distinct offences, the judgment is good, provided the sum of all does not exceed what would be permissible on one.

It is difficult to find a reason for this distinction. A man, having been convicted for three disconnected misdemeanors, stands before the tribunal to receive sentence. The judge pronounces what he deems just for misdemeanor number one. But he had the power, by violating the rules of judicial discretion, to make the punishment heavier. Coming next to misdemeanor number two, he addresses the prisoner thus: "Had I, when sentencing you for misdemeanor number one, shown myself unworthy to sit on this bench by improperly inflicting on you the highest penalty which the law allowed for what is charged against you, I should have no jurisdiction to punish you for this separate offence of yours. But as I inflicted only half the punishment which you incurred when committing misdemeanor number one, I now impose on you the other half for misdemeanor number two. As to misdemeanor number three, you cannot be punished for it, because you have been punished for numbers one and two. It is the rule, in circumstances such as attend this case, that a prisoner is to escape punishment for a third offence if he has already had imposed on him half the measure of the law for each of two preceding offences." Now, it is believed that, since the plea of *autrefois attainé* ceased to be known in the law, no case other than this of Tweed's has appeared in our books wherein there is even an intimation that, in any circumstances, the right of a court to punish a convicted person for an offence depends upon whether or not a sentence, and what sentence, has been pronounced against him for another and independent offence. In Wilkes's case, the judges, in advising the House of Lords, said: "The balance is to be held with

steady, even hand; and the crime and the punishment are counterpoise each other; and a judgment given, or to be given, against the same person, for a distinct offence, is not to be thrown into either scale, to add an atom to either."¹⁵

Speaking of the English law, the court observed: "It is quite evident that there would probably be no precedents of cumulative punishments, each to the full measure allowed by law, as they were imposed in the case before us. The reason is obvious. In England the punishment for misdemeanors is, as a general rule, discretionary with the court. As the court could, in all cases, upon a conviction of one or more misdemeanors, pass such judgment, and impose such punishment, as it should deem proper and apportioned to the crime or crimes charged, cumulative sentences, each fully exhausting the statutory power of the court in respect to a single offence, could not be imposed, as there is no such limit, and cases in England within this rule and form of punishment would give no color or support to the present judgment."¹⁶ In fact, however, there are reported English cases exactly within Tweed's case, as explained by this distinction; and the English judges took of them directly the opposite view to that taken of Tweed's case by the New York court. Thus it was provided by the statute of 2 Will. 4, c. 34, § 7, that, "if any person shall tender, utter, or put off any false or counterfeit coin, resembling," etc., "every such offender shall," etc., "be guilty of a misdemeanor," etc., "and, being convicted thereof, shall be *imprisoned for any term not exceeding one year.*" Thereupon a man was indicted, in two separate counts of one indictment, for two several utterings, to different persons, on one day. Being convicted, the judge sentenced him, not as Tweed was sentenced, on each count, but to one consolidated imprisonment for two years. Was this right? "This case," says the report, "was considered in Easter term, 1834, by all the judges (except Park, J., and Patteson, J.), and they were unanimously of opinion that the sentence was incorrect, and that there *should have been consecutive judgments of one year's*

¹⁵ Wilkes's Case, 19 Howell St. Tr. 1075, 1134.

¹⁶ Page 582.

*imprisonment each*¹⁷—a direction which, it is perceived, the trial judge precisely followed in sentencing Tweed.

This case appears not to have been before the Court of Appeals. Neither was the following: A statute provided for a misdemeanor in office, the forfeiture of an exact sum of money in part punishment. An information charged several offences, in separate counts, exactly as in Tweed case; and, upon conviction, the judge sentenced the prisoner as Tweed was sentenced, to pay the whole forfeiture on each count. And the Court of Queen's Bench *in banc* and the Court of Exchequer Chamber both held this to be right.¹⁸

But there was before the Court of Appeals an English case stated by the learned judge who delivered the principal opinion, and reasoned upon, as follows: "What is popularly known as the Tichborne case is claimed to be a direct authority for the conviction and sentences in the case at bar. The prisoner was convicted, upon a trial before Lord Chief Justice Cockburn and his associates, of two distinct acts of perjury, upon separate counts in an indictment, and sentenced upon each to transportation for the term of seven years, as for disconnected offences, and it is said that the time named is the extreme limit of punishment upon a single conviction for the crime charged. But, if it be so, then there was a conviction for two offences, which in this state would be felonies, on the same trial, which is not permissible with us. The decision cannot be regarded as authoritative evidence of the law with us. It is enough to say that no question appears to have been made to the judgment; and whether it is as authorized by some statute, we do not know. Be that as it may, the judgment has not received the deliberate sanction of any court *in banc*, and has not ripened into a precedent, even in England. It is, at most, but evidence of what the common law is, as now administered in that country, but

¹⁷ *Rex v. Robinson*, 1 Moody, 413.

¹⁸ *Douglas v. Reg.*, 13 Q. B. 74. See, as to these two cases, 1 Russ. Crimes, 5th Eng. ed. by Prentice, 233, 305, and note; 1 Bishop Crim. Proc. 2d ed. § 1129.

vidence as to what it was on the 19th of April, 1775." ¹⁹ is to any English statute regulating this question, plainly, if there were one, it would have been discovered by the diligent counsel for Tweed. And, in this English case, every imaginable objection was taken by the defendant; and, if this one was not taken, the reason must have been that the question was too well settled to admit of argument. I cannot imagine how any legal person can so read the English cases as to doubt that the law was thus, and thus settled, in England, and that it has never there been otherwise. ²⁰

In our own states—not speaking now of New York—the decisions are uniform, and in harmony with the English doctrine. For example, two or more offences of unauthorized liquor-selling, where each is punishable by a specific fine, may be joined in distinct counts in one indictment, and, on conviction, the full fine for every count may be imposed. ²¹ So it has been held, under a statute, that the keeping open of an ale-house and the selling of ale on a Sunday are two distinct offences; and, on an indictment in two counts, one for each, the fine for both may be imposed. ²² But not further to particularize, and observing that our courts hold the doctrine to be applicable equally where the punishment is imprisonment as where it is a fine, the English view of the question, directly contrary to what is adjudged in Tweed's case, is maintained in Massachusetts, ²³ in Connecticut, ²⁴ in Pennsylvania, ²⁵ in Missouri, ²⁶ in Illinois; ²⁷ and it would seem

¹⁹ Page 576.

²⁰ See, in addition to cases already cited, *Rex v. Jones*, 2 Camp. 131; *Campbell v. Reg.*, 1 Cox C. C. 269, 2 *ib.* 463, 11 Q. B. 799; *Gregory v. Reg.*, 15 Q. B. 974.

²¹ *Barnes v. The State*, 19 Conn. 398.

²² *The State v. Ambs*, 20 Misso. 214.

²³ *Carlton v. Commonwealth*, 5 Met. 532; *Booth v. Commonwealth*, 5 Met. 535; *Josslyn v. Commonwealth*, 6 Met. 236, 240; *Crowley v. Commonwealth*, 11 Met. 575; *Kite v. Commonwealth*, 11 Met. 581; *Commonwealth v. Tuttle*, 12 Cush. 305.

²⁴ *The State v. Tuller*, 34 Conn. 280; *Barnes v. The State*, 19 Conn. 398.

²⁵ *Commonwealth v. Birdsall*, 19 Smith (Pa.), 482.

²⁶ *The State v. Ambs*, 20 Misso. 214; *The State v. Peck*, 51 Misso. 111.

²⁷ *Mullinix v. People*, 76 Ill. 211, 215; *Martin v. People*, 76 Ill. 499.

to be also in Maine,²⁸ Ohio,²⁹ Arkansas,³⁰ Wisconsin,³¹ California,³² and probably some of the other states. On the other hand, I have looked into all the cases cited from the books of reports in Tweed's case, and into such others as seemed to afford any promise of instruction, and I find no one, English or American, ancient or modern, which furnishes a precedent, or an authority, or even a *dictum*, for the conclusion arrived at by the court. Still, as I have said, I do not question the correctness of this decision as an exposition of New York law. That enquiry does not lie within my path. If the law out of New York is not settled, as I have there explained it, contrary to this New York view, then neither adjudication nor legal argumentation can establish anything. Our professional books are useless; jurisprudence is a mystery.

I should here close; but a single explanation will prevent confusion in the minds of those who look further into the case. It was the English doctrine, established in early times certainly as early as 1716, and confirmed by the House of Lords, "that," in the language of the judges, "a judgment of imprisonment against a defendant, to commence from and after the determination of an imprisonment to which he was before sentenced for another offence, is good in law."³³ This is still the doctrine of the common law of England, and, as to felonies, it was confirmed by Stat. 7 & 8 Geo. 4, c. 28, § 10.³⁴ This doctrine has been generally followed in our states;³⁵ but, in a few of them,³⁶ some oversight, or a construction which a statute has been deemed to require, has led

²⁸ The State v. Hood, 51 Maine, 363.

²⁹ Buck v. The State, 1 Ohio State, 61; Woodford v. The State, 1 Ohio State, 427.

³⁰ Baker v. The State, 4 Pike, 56.

³¹ The State v. Gummer, 22 Wis. 441.

³² People v. Forbes, 22 Cal. 135; People v. Shotwell, 27 Cal. 394; *Ex parte* Dalton, 49 Cal. 463.

³³ Wilkes's Case, 19 Howell St. Tr. 1075, 1136.

³⁴ 1 Russ. Crimes, 5th Eng. ed. by Prentice, 81, 82; Rex v. Williams, 1 Leach, 529; Reg. v. Cutbush, Law Rep., 2 Q. B. 379.

³⁵ 1 Bishop Crim. Law, 6th ed. § 953, and the cases there cited.

³⁶ Prince v. The State, 44 Texas, 480; *Ex parte* Meyers, 44 Misso. 279; Miller v. Allen, 11 Ind. 389; James v. Ward, 2 Met. (Ky.) 271.

holding the other way. Still, there could be no question on this subject in Tweed's case; for the Revised Statutes had provided that, "when any person shall be convicted of two or more offences, before sentence shall have been pronounced upon him for either offence, the imprisonment to which he shall be sentenced, upon the second or other subsequent conviction, shall commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second term of imprisonment, as the case may be."³⁷ This statute, it appears, would have rendered a consolidated judgment equally good with one in the form adopted by the court below.³⁸

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CAMBRIDGE, MASS.

³⁷ 2 R. S. of N. Y. p. 700, § 11.

³⁸ 5 R. S. by Edm. 560; *People v. Forbes*, 22 Cal. 135, 138.

*V. THE DARTMOUTH COLLEGE CAUSES AND THE
SUPREME COURT OF THE UNITED STATES.*

(No. 5.)

Constitutions are, in theory or in fact, a restraint upon "those in authority." They vary in form with time, place, and circumstance. The British constitution is a mass of traditions and customs inwrought by the conservative temper of the classes which create and control the two great estates of the realm; the constitutions of several of the colonies were royal commissions; the constitution of Russia was a wholesome fear of assassination; and in the United States the constitution is, in form, a written instrument, but in fact, what five or six men on the supreme bench see fit to make it. Gouverneur Morris, one of the greatest of its framers, called that experiment "a vain attempt to tie up the arm of government with paper bands." This is the point where our institutions touch despotism the nearest. The moss-grown rule is, that judges shall not make, but construe, laws, and interpret constitutions; but this rule cannot remould human nature. If the judges err in their interpretation, either through mistake, inadvertence, bias, or design, the same result follows—they alter, amend, or repeal the provisions of the constitution at will. For this there is no remedy.

The influences to which we referred in a previous paper may affect the action of the court, but the judges are beyond the reach of public opinion.

The fathers borrowed from Great Britain the forms of impeachment. In 1820 Jefferson termed it "an impracticable thing, a mere scarecrow;" and the writer, not to speak of other instances, who has seen Underwood, at Richmond, occupying the seat of John Marshall, has a real-

ing sense of what Jefferson meant. To-day it hardly es to the dignity of a farce. Impotent for good, these provisions must be a dead letter in the future, unless revived an instrument of partisan vengeance, when both houses e controlled by the same party.

The constitution provides for its amendment, but the process is slow, uncertain, and useless, unless the judges favor it. 1793, in *Chisholm v. Georgia*, Jay, true to his idea that states were but county corporations, sought, contrary to the opinion of Hamilton and Marshall, to bring the defendant state to the bar of his court, just as he would the members of a quoit club, or an incorporated cheese factory. The people reversed that decision by the eleventh amendment.

In 1821 Judge Marshall, in *Cohens v. Virginia*, by a "liberal" interpretation of the original provisions and by a strict construction of that amendment, nullified the purpose of the people in adopting it by holding that it did not apply where the original proceeding was instituted by the state, and that the prohibition was addressed to the federal courts. The same fate befell another amendment in the Slaughterhouse cases.

In 1856 the court held that Congress could not prohibit slavery in territory acquired by the federal government by treaty. This decision was reversed, a few years later, by a gigantic civil war.

Few men desire the repetition of the farce of impeachment, or the fruitless experiment of attempting to restrain the judges by constitutional amendments, or the costlier one of reversing decisions by a resort to arms.

John Marshall had no hand in forming the federal constitution, but for twenty-six out of the thirty-four years of his judicial life that constitution was, through compromise or otherwise, what he saw fit to call it.

The life and acts of such a man should be scrutinized with care and weighed with candor.

Mind and body harmonized with each other, but in both Marshall was unlike other men—an extraordinary and peculiar being. He was tall—six feet in height—thin, slender,

angular, meagre, and emaciated, but erect and agile, while his muscles were so relaxed and joints so loose as to destroy all harmony in his movements and grace in his actions. His complexion was swarthy; his head was small, covered with shocks of thick, stout, wiry hair, raven black; his forehead was rather low, but upright, and full in the temples; his face was small, making nearly a circle in its outline; his eyes were small, twinkling, piercing, and dark as midnight; his voice was dry and hard; his attitudes, at best, extremely awkward, and his only gesture in speaking was a perpendicular swing of the right arm. He was of Welsh descent; was the oldest of fifteen children; his father was a Virginia planter and surveyor, of limited means. He was born in Fauquier county, September 24, 1755, and died in Philadelphia, July 6, 1835. Previous to the Revolution he resided most of the time near Manassas Gap and at Oak Hill. The society was very primitive. The people lived on mush and balm tea, and the women fastened their dresses with thorns instead of pins. The population was sparse, accessible schools were unknown, and facilities for acquiring knowledge were exceedingly limited. Until his fourteenth year his father was his only instructor. He spent his fifteenth year with James Monroe, a hundred miles from home, in the study of Latin, under the private tutorship of a clergyman; the next year he continued his studies under the supervision of a Scotch parson, in his father's family; and this was all the education he ever had.

Early in his eighteenth year he commenced the study of the law, but the din of the approaching conflict compelled him to abandon Blackstone and turn to other pursuits. In the spring of 1775 he was made lieutenant in a militia company, and soon after first lieutenant in one of "minute men;" in December, 1775, he was in the battle of Great Bridge, about twelve miles from Norfolk; in July, 1776, he was appointed lieutenant in the 11th Virginia (Continental), and in the winter of 1776-7 joined the army at Morristown; in May, 1777, he was made captain, and was in the engagement at Iron Hill, at Brandywine in September, at German-

town in October, and went into winter quarters at Valley Forge in December following. He was at Monmouth in June, 1778; with Wayne at Stony Point, and at Powle's Hook in July, 1779; in the winter of 1779-80 he attended the law lectures of Wythe—afterwards chancellor—at William and Mary's College, retained his connection till the summer of 1780, and soon after obtained a license to practice; in October, 1780, he returned to the army and remained till 1781, when he resigned his commission, and devoted himself to the study of his profession till after the surrender of Cornwallis in October, 1781, when the courts were re-opened; after the Revolution he became a general of the state militia, and, in consequence, from that time till 1801, when he was made chief justice, was almost entirely known as General Marshall; in the spring of 1782 he was elected a member of the lower house from his native county, and, in the autumn, to the executive council; in January, 1783, he married, and removed to Richmond, where, in spite of the flattering inducements held out if he would remove to Philadelphia, he resided till his death. Early in 1784 he resigned his place in the council, and in the spring was again elected a member from Fauquier, and represented Henrico from 1787 till 1792; in 1788 he was one of the lieutenants of Madison, Randolph, Pendleton, and Junis in the convention of June, which ratified the federal constitution; from 1792 till 1795 he devoted himself almost entirely to his large and constantly increasing practice; in 1795-6 he again represented Henrico; in May, 1797, he was appointed, and in July, with Pinckney and Gerry, left the country, as envoy to France, and on June 17, 1798, he returned to New York; he was elected a member of Congress from the Richmond district by a small majority, and took his seat at the December session, 1799; on June 13, 1800, after the explosion in the cabinet cabal, which had been inherited by Adams, he was made secretary of state, and continued a controlling spirit in the cabinet until the last hours of that administration; on January 20, 1801, Adams nominated him as chief justice; he was confirmed January

27, and commissioned on January 31, and presided at the term which ended February 9, of the same year.

"Blood will tell." Marshall had rare gifts. His character was the result of a peculiar interblending of many opposites—its power lay in the combination.

He was simple and unpretentious, and as modest, sensitive, and averse to every form of notoriety, as he was courageous; he had an ardent social nature, a seductive personal magnetism; he was a delightful companion, fluent and facile in conversation, and, aside from Andrew Johnson, the most eloquent listener in the Union; he was full of sly, waggish humor, genial and convivial; his temper was serene and imperturbable; his patience almost inexhaustible; and his judgment clear, cool, wary, and calculating. In youth and early manhood he delighted in foot-races and the rough sports of the country, and was as full of poetic longings, aspirations, day dreams, and romances, as a school-girl. Naturally indolent, and seldom studious, from boyhood to the "yellow leaf" of old age, his soul revelled in quoit-pitching by day and novel-reading by night. Like Webster, he loved a plain house and a sumptuous board—loved solid power and the luxury of ease—and, like Everett, loved the old home, old scenes, old friends, and old wine. He never sought office; cared little for place, nothing for titles. He was a born diplomatist, and showed himself an overmatch for Talleyrand, with all the latter's training. He was a natural politician, and, in general, knew thoroughly the public men of Virginia and Maryland, with whom he was brought in personal contact, and but little of those in the rest of the Union. His powers of analysis, like those of Fox, were singularly acute; no man could be clearer, if he chose, in statement or in reasoning; but, when hard pressed, his subtlety in both, equalled only by that of Aaron Burr in practice, enabled him to ascend, by abstract reasoning, into the clouds, beyond the reach of ordinary minds. He cared little for authority, but relied mainly on his own reflections. With Story the test was, "the policy of the law is ——;" with Marshall,

"I have not looked much into the cases, but I think the law ought to be ——;" or, as Story says, "while I am compelled to creep from point to headland, Marshall puts out to sea." Without imagination, his mind was essentially mathematical and legislative. He loved not Coke, the stern old framer of the Petition of Right, but the courtly Blackstone. He lacked the attainments of Jay; the great legal learning and the superb organizing genius of Rutledge; and great opportunities were afforded him during his long judicial life, which Ellsworth never had; but the kingly dignity, the exalted conscience, the immutability of will, and the slow but ponderous intellect of the latter, were wanting.

"Never in the flow of time," to use the words of Gouverneur Morris, was there a moment so propitious for that purpose as when the work of the federal convention was submitted for ratification. The ablest and purest men in the Union were arrayed on the one side or the other. Talent, tact, and management carried it in New York, Massachusetts, and New Hampshire by a close vote, and in reality against the popular will.

The parties which subsequently arose were called Federal and Republican. Both were misnomers. The Federalists were not opposed to a republic, nor were the Republicans opposed to a federal government. The constitution itself was a compromise, and, as was justly said by Ellsworth and Madison, "partly National and partly Federal." Both were in favor of conferring upon the general government such powers as they deemed necessary for its preservation.

The difference was, as it were, a question of political geography—where the boundary line between the powers conferred upon the federal government, and those retained by the states or people, should be located; and, as a consequence, one party became known as "liberal," and the other as "strict," constructionists. Behind each of these phrases lay a fundamental idea, but the terms themselves, as the subsequent history of parties and the country has abundantly shown, were elastic and indefinite, admirably adapted to political exigencies and the needs of politicians. There was,

of course, a general accord in the views of the leaders of the respective parties, but those of Jay, Hamilton, Adams, Marshall, and Story were far from identical; and the same is true of Jefferson, Madison, and Gerry, though with them the differences were less marked. The first four favored the ratification—part because they believed in it, and the rest as a choice of evils. Patrick Henry and Luther Martin, who afterwards became such eminent Federalists, exerted their great powers to the uttermost against it, and Gerry followed in their train. In the Virginia convention Madison was the great leader—"the cloud by day and the pillar of fire by night"—of its supporters. Jefferson was abroad. Had he thrown the positive weight of his great influence into the scale against it, the probabilities are very strong that no human power could have secured in its favor a majority of the Virginia convention.

The name of Washington was undoubtedly more potent, but no one man, by his own exertions, contributed so much to secure the ratification as Hamilton; and yet, anomalous as that may seem, few, even of its opponents, had less faith in it, or disliked it more. In the convention, on September 6, 1787, he said "that he had been restrained from entering into the discussions by his dislike of the scheme of government in general, but as he meant to support the plan recommended as better than nothing, he wished in his place to make a few remarks."

In the closing hours of the convention, September 17, 1787, he said: "No man's ideas were more remote from the plan than his were known to be; but is it possible to deliberate between anarchy and convulsion on one side and the chance of good to be expected from the plan on the other?"

We owe to him the "Federalist." For that great work he selected for his associate his intimate personal and political friend, Gouverneur Morris. In his letter of February 24, 1815, to Hills, Morris says: "I was warmly pressed by Hamilton to assist in writing the 'Federalist,' which I declined."

There were obvious reasons for Hamilton's choice, one of which appears in the letter of Morris, of December 22, 1814,

to Pickering, the discarded secretary of John Adams: "That instrument [the constitution] was written by the fingers which write this letter." Madison—and Jay, to a limited extent—took the place of Morris. No man knew the difficulty referred to, or the views of Hamilton, better than Morris. In his letter to Walsh, of February 5, 1811, he thus states the fears of the fathers: "Fond, however, as the framers of our national constitution were of republican government, they were not so much blinded by their attachment as not to discern the difficulty, perhaps impracticability, of raising a durable edifice from crumbling materials. History, the parent of political science, had told them that it was almost as vain to expect permanency from democracy as to construct a palace on the surface of the sea." In the letter last quoted Morris says: "General Hamilton had little share in forming the constitution. He disliked it, believing all republican government to be radically defective. He admired, nevertheless, the British constitution, which I consider an aristocracy in fact, though a monarchy in name." * * * "He heartily assented, nevertheless, to the constitution, because he considered it as a band which might hold us together for some time, and he knew that national sentiment is the offspring of national existence. *He trusted, moreover, that, in the changes and chances of time, we should be involved in some war, which might strengthen our union and nerve the executive.* He was not, as some have supposed, so blind as not to see that the president could purchase power, and shelter himself from responsibility by sacrificing the rights and duties of his office at the shrine of influence."

In his letter to Ogden, of December 28, 1804, he says: "Our poor friend Hamilton bestrode his hobby to the great annoyance of his friends, and not without injury to himself. More a theoretic than a practical man, he was not sufficiently convinced that a system may be good in itself and bad in relation to particular circumstances. *He well knew that his favorite form was inadmissible, unless as the result of civil war; and I suspect that his belief in that which he called an approaching crisis arose from a conviction that the kind of government*

most suitable, in his opinion, to this extensive country could be established in no other way." * * * "General Hamilton hated republican government because he confounded it with democratical government, and he detested the latter because he believed it must end in despotism, and be, in the meantime, destructive to public morality. He believed that our administration would be enfeebled progressively at every new election, and become at last contemptible."

The Revolution brought Marshall in contact with Hamilton, then on Washington's staff, and he became so impressed with his learning and genius that he never afterwards freed himself from their influence. At a later period he became a follower of this great leader, but, like the Taney's, and that distinguished class of southern Federalists to whom Walcott refers, was much more moderate.

The fatigues of the camp and the grave responsibilities which rested upon him during the war and his first administration had their effect even upon the powerful frame of Washington; and towards the close of his last administration his energies became relaxed, and his memory, never good, seriously impaired.

Jefferson and Hamilton were pitted against each other during the first administration of Washington. On December 31, 1793, finding his situation unpleasant and his influence outweighed by that of Hamilton and circumstances, Jefferson resigned; policy and the pressure of public opinion compelled Hamilton to follow him about a year later; and Randolph, who took the place of Jefferson, was driven, by an enforced resignation, from the cabinet in disgrace. Washington tried in vain to fill the vacant places with men fitted for them, but such would not accept, and he was compelled to select from an inferior class. Three out of the four belonged to the Hamiltonian wing of the Federal party. These men have made their own record in their private correspondence. They fastened themselves like leeches on John Adams. Under both administrations they took their inspiration and guidance from Hamilton. They were the creatures through whom he moulded the policy of the gov-

ernment. By his election Adams became the nominal, while Hamilton remained the real, head of his party. The difference between these two was almost as marked as that between Adams and Jefferson after the French Revolution. They differed not only in matters of detail, but as respects first principles. Few men have been so misrepresented and so misunderstood as Adams. Pickering, Walcott, and McHenry were spies in his cabinet, plotting in the interest of Hamilton to defeat all his beneficent purposes, and to destroy their official head; and the managing spirits in the Senate, under the same control, were but little better. Together they made him responsible for measures which he never originated, and to which he was at heart opposed. Such a state of things could not last. The moderate Federalists of the south and east, under the lead of Marshall and Dexter, rallied to the support of Adams. Pickering refused to resign, and on June 12, 1800, Adams removed him and put Marshall in his place.

The presidential campaign came on, with Hamilton still plotting the defeat of Adams. The Union became an ocean of political passion, without a parallel except that which preceded the late civil war. Partisan fury spared nobody; life-long friends turned away from each other as they met; the furnaces of defamation, seventy-and-seven times heated, flamed incessantly; and more than the seven vials of vituperation were poured out upon the devoted heads of Jefferson, Adams, and their respective adherents. We can realize how such passions darken the understanding and harden the hearts of men when we know that John Marshall, who so seldom spoke ill of any one, put his preference for Burr upon the ground that the morals and principles of even Aaron Burr were *purser* than those of Thomas Jefferson. The election went to the House of Representatives. There were sixteen states. Jefferson controlled eight, the Federalists six, and tied the other two.

From February 11 to 17, 1801, all business was paralyzed, and in the madness of the hour the most thoughtful and considerate men feared that the day of doom for the union

of these states was at hand. More than three-fourths of the Federalists in both houses of Congress lost their heads; passion took the place of judgment; their trusted leaders, Hamilton and Morris, lost all control over them; against their advice they voted steadily for Burr; they determined to elect him if they could, and, if they failed in that, to put the presidency into "commission," as the British sometimes do the "Great Seal," by passing an act vesting its powers in Jay, Marshall, or some person to be elected by them president of the Senate. When it became reasonably certain that Burr could not be elected, Jefferson sought an interview with Adams for the purpose of inducing him to arrest the other desperate measures. We know what that interview was and the result of it. Jefferson was told upon what terms he could have the presidency; he refused to purchase it by capitulation; there was but one step more for the Republican leaders to take, and they acted with promptness and decision; they controlled important states, and resolved to prevent what they regarded as usurpation by a resort to arms. This shook a few of the more moderate men. The probabilities are that Jefferson never would have been president but for Hamilton, who had sought to make Pinckney president, over Adams, by a species of treason to the head of the ticket, and then, to defeat Burr, threw the positive weight of his great influence with certain members in favor of Jefferson. But even he was unable to secure the coöperation of Marshall.

Between Marshall and Jefferson, as before stated, there was a relentless personal and political antagonism which had been growing for years, and which intensified as they rolled on, and colored every thought and act of each in relation to the other. The root of the political antipathy it is easy to discover, but the source of the personal hatred is unknown. There are few sadder spectacles than that of Jefferson at eighty-one, after his cordial reconciliation with Adams, and when he had forgiven every other enemy, replying to Marshall's note: "And even Judge Marshall makes history descend from its dignity, and the ermine from its sanctity,

to exaggerate, to record, and to sanction this forgery;" unless it be that of the aged chief justice, eight years later, in assumed self-justification, firing a parting volley at the ashes of his dead antagonist.

In some respects these men were alike. They were of Welsh extraction, Virginians, men of eminent talents and strong convictions, simple and unaffected, and possessed of the most cordial social natures. Neither was given to enduring hatred. Jefferson forgave all but Marshall; Marshall spared the world his enmity and lavished it upon Jefferson.

Late in 1800 Ellsworth, then in England, resigned, and Jay, who had once resigned the position of chief justice for a foreign mission, was appointed and confirmed in his place. Adams personally pressed him to accept, but he peremptorily declined. The "ultra-Federalists" strenuously insisted that the place should be given to Justice Paterson; but Adams, partly from a dislike for that wing of his party, and partly because he desired to avoid wounding the feelings of his old friend Cushing, the senior judge, and probably because of his partiality for Marshall, who had rendered him such signal services in the case of Nash or Robbins, as well as in the cabinet, refused to make the desired appointment, and nominated the latter, who promptly accepted the position. He had abundant reasons therefor. He probably never held an office that harmonized with his tastes and diplomatic nature except that of secretary of state. He cared little for the chief justiceship itself, less for the honor, nothing for the salary. The terms of the courts were so arranged, and the condition of the dockets such, that the position gave him what he desired—an opportunity to remain at home, at his leisure. Previous to his accession to the bench, not only the jurisdiction of the Supreme Court was limited, but also the number of causes upon its dockets. This tribunal had been in successful operation, in general with a retinue of six judges, for eleven years, and had, so far as the reports show, including a variety of motions and matters of practice, decided sixty-four causes, an average of about six annually; and less than ten of these causes were of special importance. The position appealed

to Marshall's love of power, and enabled him to keep watch and ward over Jefferson.

The appointment at first gave great dissatisfaction. The Republicans complained that Adams, because of his own personal hostility, had put the strongest opponent of their chief in Virginia as a check over him. The dominant factions of the Federal party treated the nomination of Jay as a farce, and complained that Adams had disregarded the claims of Pater-son in order to reward "the favorite," who held views in relation to party policy and the construction of the constitution more liberal than their own.

Wolcott, in his letter to Fisher Ames, states with precision what they thought of Marshall and his views: "He is, doubtless, a man of virtue and distinguished talents, *but he will think much of the state of Virginia, and is too much disposed to govern the world according to the rules of logic. He will read and expound the constitution as if it were a penal statute, and will sometimes be embarrassed with doubts, of which his friends will not perceive the importance.*"

With occasional fluctuations like that from Gibbons v. Ogden, in which, contrary to his prior convictions, he absorbed and afterwards reiterated the argument of Webster, to Wilson v. Blackbird Creek Company, in which the reasoning and conclusion were his own, he gradually changed his meridian toward that of Jay.

The extent of the business of the Supreme Court during the time Marshall presided over it has been much exaggerated. Less than thirteen hundred cases were decided by it, and, in those, Marshall delivered about five hundred and fifty opinions, or, on an average, about fifteen a year. During the first two years after he came to the bench but five causes were decided, in four of which he delivered the opinion. His first term lasted five days. The average number of causes decided per year was about forty. But a few years ago the Supreme Court of Pennsylvania, under Chief Justice Agnew, held a term of seven weeks, and in that time disposed of four hundred and twenty-five out of the four hundred and fifty cases on his docket. The contrast is apparent.

It is true that some of the decisions of the federal Su-

preme Court were of transcendent importance, but the mass of them were of no greater consequence than those which came before the supreme courts of the several states.

In December, 1801, the famous case of *Marbury v. Madison* came legitimately before the court. The facts were few and simple.

The last part of the last session under Adams was spent by him and his cabinet in making appointments which should properly have gone over to the incoming administration. The reason assigned by Adams for this step was that he regarded the power lodged in his hands as a great trust, which it was his duty to exercise for the good of the Union; that his faith had been shaken in the principles of Jefferson, and particularly those relating to the judiciary; that if he did not fill the positions, and thus defeat the purposes of Jefferson, the latter would obtain control over the courts by filling them from the ranks of his political friends who shared his views, and thus endanger the government. As Jefferson phrased it: "The last day of his [Adams'] political power, the last hours, and even beyond the midnight, were employed in filling all offices, and especially permanent ones, with the bitterest Federalists, and providing for me the alternative, either to execute the government by my enemies, whose study it would be to thwart and defeat all my measures, or to incur the odium of such numerous removals from office as might bear me down." Commissions were sent to fill vacancies where no vacancies could exist, unless created by the appointee vacating one office by accepting another; others were sent through the mail to marshals, etc.; Adams had signed the commissions of William Marbury, Dennis Ramsay, Robert T. Hooe, and William Harper, as justices of the peace for the District of Columbia; the secretary of state had affixed to them the seal of the United States in due form, but they had never been delivered, Adams having left before the morning light of the day on which his successor was inaugurated; they were found by Jefferson upon the table of the secretary, and he forbade their delivery.

Madison did not assume the office of secretary of state

for several weeks. In the meantime the attorney-general, Levi Lincoln, whose judicial sandals were afterwards taken by Story, was the acting secretary of state, and was cognizant of the facts. Lee, the attorney-general under Adams, moved in the Supreme Court, in each case, for a rule on Madison to show cause why a *mandamus* should not issue, commanding him to deliver the respective commissions. Lincoln and other witnesses were examined in the presence of the court upon written interrogatories. He stated that he was acting secretary of state when the transaction happened; that he did not know that the commissions ever came to the possession of Mr. Madison, or that they were in the office when Madison took possession of it; he refused to state what had become of them, the court saying if they never came to the possession of Mr. Madison it was immaterial to the present cause what had been done with them by others. The rule issued; the secretary of state was silent, but the cause was elaborately argued in behalf of the petitioners upon the motion for a peremptory writ. At the February term, 1803, Judge Marshall delivered an opinion covering nearly twenty-seven pages in the printed volume. This was the first of that line of remarkable constitutional opinions upon which the reputation of Marshall, as a jurist, must mainly rest. The issue, in a legal sense, was exceedingly narrow. The vital and decisive question which confronted the petitioners at the very threshold of their case was, whether the court had jurisdiction; and this depended upon another, whether Congress could annul the constitution, or authorize or compel the court to disregard its provisions. This decision has often been treated as though Marshall had discovered some new principle, as Newton did the law of gravitation. The question was neither new nor difficult, nor did Marshall so regard it. There was nothing new in his reasoning upon that point. He simply reiterated what had been previously said by Hamilton, Wilson, and by many other eminent statesmen and jurists. In his opinion he says: "The question, whether an act repugnant to the constitution can become the law of the land, is a question

deeply interesting to the United States, *but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.*" And, in *Cohens v. Virginia*, he said: "In the case of *Marbury v. Madison* the single question before the court, so far as that case can be applied to this, was, whether the legislature could give this court original jurisdiction in a case in which the constitution *had clear'y not given it*, and in which *no doubt* respecting the construction of the article *could possibly be raised.*"

In the dark days which preceded the Revolution the people of the colonies had been thoroughly indoctrinated with the idea that the acts of Parliament of which they complained were unconstitutional, and therefore void, and that, in consequence, they were justified in resisting their enforcement. Judge Wilson, in a famous pamphlet, had urged with great ingenuity and force that it was the right and the duty of the courts to set aside such acts. This view was supported by many of the most eminent politicians, statesmen, and jurists of that day. This doctrine had sunk deep into the popular mind.

Before the adoption of the federal constitution, Judge Wilson and Gouverneur Morris had argued the great case of the Bank of North America before the legislature of Pennsylvania. Morris said: "They [the representatives] knew that the boasted omnipotence of legislative authority is but a jingle of words. In the literal meaning it is impious. And whatever interpretation lawyers may give, freemen must feel it to be absurd and unconstitutional. Absurd because laws cannot alter the nature of things; *unconstitutional because the constitution is no more if it can be changed by the legislature.*" The judges in Rhode Island had set aside an act of the legislature as unconstitutional. In 1788 and 1793 the court of appeals in Virginia had done the same thing. The power of the highest court to set aside such acts was recognized in New Hampshire soon after the adoption of the written constitution of 1784. From 1790 to 1799 they were repeatedly declared void by the highest court, and sometimes

by inferior tribunals. Jeremiah Mason began practice in New Hampshire in 1791. With characteristic humor he thus describes the manner in which two statutes of the state were set aside, one by a justice of the peace and the other "by the inferior court of common pleas."

In his autobiography, Mason says: "At this time the legislature was in the practice of frequently interfering with the business of the courts by granting new trials and prescribing special rules for the trial of a particular action. A ludicrous instance of the exercise of this sovereign power occurred early in my practice at Westmoreland. A poor man was accused of having stolen two small pigs of a neighbor, who applied at my office for a prosecution for larceny. Doubting whether the taking of the pigs under the circumstances amounted to stealing, one of my students, to whom in my absence the application was made, advised to an action of trover; this was commenced, in which the two pigs were alleged to be of the value of one dollar. The deputy sheriff, in serving the writ, finding nobody at the defendant's cottage, left the summons safely placed between the door and sill, which the plaintiff, living near, saw done. As soon as the sheriff was out of sight the plaintiff went and stole away the summons. Unluckily for him, this was seen by a person at a distance. The action was, of course, defaulted, and the first news the defendant had of it was an execution. He made a great outcry, and soon ascertained that the summons had been stolen. He came to me with his complaint, and I offered him to have the judgment and execution cancelled, and to let him have a trial for the pigs. This he rejected with contempt, and forthwith applied to the legislature, then in session, for a remedy for his grievance. The legislature, without notice to the opposite party, immediately passed an act directing the magistrate to cite the plaintiff before him, set aside the default and try the action, and to allow to either party an appeal. The plaintiff was cited, and I appeared for him, and denied the power of the legislature to pass the act, and went into an argument on the constitutional restraints of the legislative power. This was

answered by the opposing counsel by portraying the audaciousness of the attempt of an inferior magistrate to question the power of the supreme legislature. But the justice, having been an officer in the Revolutionary army, and being desirous of sustaining his reputation for courage, which stood high, promptly pronounced the act utterly void, and refused to obey it. An appeal was claimed and disallowed, the justice saying that, as the whole proceeding was void, he had no rightful power to record a judgment or grant an appeal. Thus ended the first act of the farcical drama. The defendant, nothing discouraged by his ill luck, obtained from the sovereign legislature, at its next session, an act directing the court of common pleas to try the defaulted action. There the parties again met, and, after due argumentation and deliberation had, that court determined they would do nothing with it. By this time the pig action had gained extensive notoriety, and tended much to bring such special acts of the legislature, interfering with the regular course of the courts of law, into ridicule and deserved contempt."

Whether the constitution conferred upon the courts the power to set aside, as unconstitutional, the laws passed in violation of its provisions, was considered by the federal convention. There were dissenting voices, it is true, but the most eminent of its members treated the power as unquestionable. Hamilton demonstrated the existence, necessity, and propriety of this power in the 'Federalist,' and particularly in No. 78, published June 17 and 20, 1788. Judge Wilson did the same. (See 1 Wilson's Works, 460, 463.) Judges of the Supreme Court, sitting at the circuit, confirmed this view; and some of them had reiterated it in their opinions, delivered from the supreme bench without, so far as we now recollect, a single dissenting voice, though there were undoubtedly able men who thought otherwise.

It is no wonder, then, that Marshall regarded the point clear and unquestionable, or that the court decided it had no jurisdiction, and ordered the rule discharged.

The most extraordinary features of the case are the extra-judicial character of nearly four-fifths of the opinion, and

the striking similarity in the conduct of its author and that of Story in *Ex parte* Christy, to which we have already referred. In both cases the personal feelings of the judges were strongly enlisted; in both it was self-evident that the court had no jurisdiction; in both, on that question, the opinions were brief; and, in both, they went out of their way and attempted to decide what the law was on a variety of most important questions not before the court; both had a purpose in adopting this censurable course, and their eminence cannot make wrong right.

Marshall's nature was robust; he compelled argument, listened patiently, and weighed with care, but was never given to sentimental delicacy in the discharge of his judicial duties; as we have already seen, he had participated in the decision—whether at the summons of Story, or of his own motion, does not appear—upon a most important question of constitutional law when no cause was before the court; he had failed to rebuke his great friend and admirer, Wirt, who sought his opinion, before he instituted his suit, in favor of the Cherokee Nation. Wirt, it is true, had taken the opinion of such jurists as Chancellor Kent, Webster, Spencer, and other lesser luminaries, who were supposed to know a little something of the law; but it was, of course, infinitely more important for him to know beforehand the opinion of the chief justice, and especially when it was almost certain that his opinion upon such a question would be adopted by a majority of the court. It would simplify practice much and lessen the labors of the profession if all lawyers could know before they instituted their causes how the court would decide them. Lord Mansfield, whom Marshall admired, had strict notions upon the subject. In *Rex v. Earl Ferrers* (1 Burrow, 633), when the Earl came to Westminster Hall he sent a message to the chief justice, desiring to speak with him, but Lord Mansfield bid the messenger tell his Lordship, "That when an Affair was depending before the Court, He could not speak with any Body about it, *but in Court.*"

In *Marbury v. Madison*, Marshall treats the case as one of

"peculiar delicacy," and says: "At first view" it might "be considered by *some* as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive;" and in this he was clearly right. In this case he was reviewing, as a judge, the legal effect of his acts, and what he had omitted to do when a member of the cabinet. It puts any judge in a delicate position when he attempts to decide questions not before him, and especially where the personal relations were of such an extraordinary and peculiar character as in this case.

Marbury and Madison were the John Doe and Richard Roe of the ejectment; the real issue was between John Marshall and Thomas Jefferson—a trial of strength in their new positions. The bulk of the opinion was a discourse upon government, addressed by one Virginia politician to another; a lecture to the new president upon the duties of his office; a horn-book for the guidance of the inferior courts in compelling the president, through his "head clerk," to obey their order when an application for that purpose should be made to them. In *Cohens v. Virginia*, Judge Marshall repudiated a portion of what he termed the "*dicta*" in this opinion.

The death of Hamilton in 1804 left Marshall the only great leader spared from the shipwreck which engulfed his political associates, and he drifted, though at first slowly, further into the Hamiltonian current. In later life, after he came under the combined influence of Pinkney, Story, and Webster, these views of Marshall were much intensified. We have before adverted to the close relations which existed between Story and Marshall and the reciprocal influence they had over each other; that of Webster assumed a different form and operated through another channel. Marshall did not even know Webster till after he read his speech of June 10, 1813. He regarded him as a statesman and a very able man, but never, even after the struggle between these two Titans in *Bullard v. Bell*, as the equal of Pinkney, whom he always declared "the greatest man and the most luminous reasoner" he had ever seen in a court of justice.

Webster won upon him by his ponderous power, through Story, and by his course in relation to the court. When the attempt was made, in 1826, to repeat what transpired under Adams when the judiciary bill was passed and the appointments made, Webster, in his confidential note to Jeremiah Mason, of May 2, 1826, says: "In looking out for men to fill these places, a very honest and anxious desire is felt, I believe to find men who *concur* in the leading decisions of the Supreme Court. If any error be committed on that point it will be through misinformation." This statement carries its own comment. It is obvious what decisions Webster had in mind. We know how this sentiment pervaded the bench, and how, in consequence, Duvall endured so much discomfort, and held his place, against his own wishes, until he ascertained that he could, in effect, name his successor.

It has been suggested that Marshall dissented from the decision in *Terrett v. Taylor*, 9 Cranch, 43. We do not so understand it.

Story, who of all men was in a situation to know the facts, in 1828, said: "Few decisions upon constitutional questions have been made in which he [Marshall] has not delivered the opinion of the court; and in these few the duty devolved upon others to their own regret, either because he did not sit in the cause, or from motives of delicacy abstained from taking an active part.

"If we do not mistake, there is but a single case in which his judgment is known to have differed from that of the court upon any point of constitutional law. That case was *Ogden v. Saunders*, decided at the last term of the court, which involved the question of the constitutionality of an insolvent law, which was passed antecedently to the formation of a contract and discharged its obligation."

We may remark here that not long after the decision in *Ogden v. Saunders*, Mr. Webster, in a conversation with Mr. Choate in relation to that in *Trustees v. Woodward*, said, with his characteristic simplicity and impressive force: "There was a point which lay upon the surface of that case, neither taken by counsel nor considered by the court. If it had

been properly presented the decision would probably have been the other way." We give the statement as we have it from a member of the profession, whose personal relations with Choate and one of the leading trustees were peculiarly intimate, and to whom Choate repeated it.

Marshall adhered to the last to his opinion in the college case. In his letter to Story of July 31, 1833, in relation to the case of Dr. Allen against the treasurer of Bowdoin College, which we have considered in a previous paper, he says: "I have received the paper containing your opinion in the very important case of Allen v. McKean. It is impossible a subject could have been brought before you on which you are more completely *au fait*. It would seem as if the state legislatures (many of them at least) have an invincible hostility to the sacredness of charters. From this paper I should conjecture that this case will proceed no further." * * 2 Life Story, 150.

A previous paper shows that when this letter was written the great Bridge case had been before the Supreme Court for years, and that Story had written out his opinion and submitted it to Jeremiah Mason for his inspection and revision nearly twenty months before.

We pass by the chaotic mass of contradictory opinions in relation to the powers conferred by the constitution over admiralty causes, etc.

In *Sturges v. Crowninshield*, Marshall was compelled by the necessities of his position, as well as by his natural convictions, to adopt the middle ground between the doctrine of Johnson and Livingston on the one hand and Washington on the other, in relation to the power of the states over bankruptcies.

In *Gibbons v. Ogden* he struck out the key-stone of the arch on which that very able constitutional lawyer, Professor Pomeroy, rests his "national" theory, by saying: "As preliminary to the very able discussions of the constitution which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these states anterior to its formation.

It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. *This is true.*"

Chief Justice Ellsworth was a leading member of the federal convention. On September 26, 1787, he and his colleague, Sherman, addressed a communication, in the nature of a report, to the governor of Connecticut. They said: "The restraint on the legislatures of the several states, * * * impairing the obligation of contracts by *ex post facto* laws, was thought necessary as a security to commerce, in which the interest of foreigners, as well as the citizens of different states, may be affected." The phraseology used shows that they understood the obligation clause to mean in civil causes what the *ex post facto* clause meant in criminal. The debates in the federal convention from which we have quoted show that this was the interpretation put upon the clause at the time by the convention. In *Ogden v. Saunders*, Marshall held the opposite, but was overruled by a majority of the court. The doctrine of the majority has since been affirmed in 1872, in *Walker v. Whitehead*, in the following emphatic language: "The act is not an *ex post facto* law only because that phrase, in its legal sense, is confined to *crimes* and their punishment.

"The constitution of the United States declares that no state shall pass any 'law impairing the obligation of contracts.'

"These propositions may be considered consequent axioms in our jurisprudence:

"The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge, and enforcement. * * * The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the constitution against impairment:

"The obligation of a contract 'is the law which binds the parties to perform their agreement:'

"Any impairment of the obligation of a contract—the

degree of impairment is immaterial—is within the prohibition of the constitution.”

But unless some limitation is imposed upon the broad terms used in these two cases from which we have quoted, a singular result might follow. The law of the place, whether statutory or otherwise, whatever it may be, by the rule stated, enters into the obligation of the contract. A, for a pecuniary consideration, might contract with B, with every possible formality of which the legal mind could conceive, to murder C. By the express terms of the contract he might be entitled to receive his compensation. He might bring his suit, but he could not recover because the law of the land, whether written or unwritten, stepped in at the formation of the contract and annulled the binding force of its express and positive terms.

If the college charter was a contract, it was a British contract, antedating the constitution itself, and every principle of British law, applicable to the subject, which existed at the time, entered into it or its obligation. If the proviso had been written into the charter that Parliament—the two legislative branches of the government—might alter, amend or repeal that charter at their pleasure, this provision would have had, to say the least, as much binding force as any other in the instrument. If such a proviso had been written in, in 1769, would the adoption of the obligation clause, in 1788, have blotted it out of the charter? And yet, so far as the law of Great Britain was concerned, such a clause would have been waste paper. The legal effect of the charter was precisely the same, whether this proviso was inserted or omitted. The foundation principle upon which the whole structure of English law and government rests, is thus forcibly stated by Story: “Even in England, where the principles of civil liberty are cherished with uncommon ardor, and private justice is administered with a pure and elevated independence, the acts of Parliament are, by the very theory of the government, *in a legal sense*, omnipotent. They cannot be gainsayed or overruled.

“They form the law of the land, which controls the pre-

rogative, and even the descent, of the crown itself, and may take away the life and property of the subject without trial and without appeal."

The ready answer to the supposed difficulty would seem to be that such a case or purpose never entered the minds of the framers of the constitution, or of the people when they adopted it; but Marshall, in *Trustees v. Woodward*, concedes that this is also true in respect to the doctrine adopted by him, and holds that it is for those who deny it or its application, to go further, and show if it had been brought to their attention they would have rejected it. How, before what tribunal, and by what evidence, can this be shown? Such a rule makes a question of constitutional law of transcendent importance depend upon a Yankee's "guess" as to what a mere question of fact was.

But a great change in the current prefigured by the revolt of a majority of the judges, in *Ogden v. Saunders*, from the domination of Marshall and Story was to come. The decisions in the great cases of the *Mayor, etc., of New York v. Miln* (11 Pet. 102), *Briscoe, etc., v. The Bank, etc., of Kentucky* (11 Pet. 257), and *Charles River Bridge v. Warren Bridge* (11 Pet. 420), were second in their importance only to the action of the federal convention in creating the constitution. They had been argued with great ability before Marshall, and had been carefully considered by him. In his opinion the state laws in question were in violation of the federal constitution, and, therefore, void. The same causes were reargued before his successor, and held valid.

The decision in the case of *The Mayor v. Miln*, aided by that in *Wilson v. Blackbird Creek Company*, smoothed the way for that in *Gilman v. Philadelphia*, in which a majority of the court made a dissenting opinion of Taney the law, and overturned one of the foundation principles of *Gibbons v. Ogden*.

The decision in the second case is especially noticeable for a reason to which no reference has been made. The corporation in that case was a bank, created and owned entirely by the state of Kentucky. It came fully within the

remarkable definition of a "public corporation" given by Story, in *Allen v. McKeen*, to wit, one where the "whole interests and franchises are the exclusive property and domain" of the state, for he says in his opinion in *Briscoe's case*: "It is clear that the bank was a mere artificial body or corporation, created for the sole benefit of the state, and in which no other person had or could have any share or interest." He then went on to hold that "the act of Kentucky establishing this bank was unconstitutional and void," and that the state could not confer upon such a corporation the power to issue bank bills.

If these two opinions are well-founded, either the fathers must have been the most unfortunate of men in the use of language, or their great, if not paramount, purpose must have been, *first*, to render it almost impossible for a state to give legal existence to a public corporation "in the strict sense;" and, *second*, if perchance such an artificial person should struggle into existence, to cut down its powers to the lowest limit, for the principle, if sound, does not stop with the prohibition against the issue of bank bills. If such was their purpose, it is incredible that they should not have manifested it in the plainest and most unequivocal terms. There is not a shred of history or a word in the debates that affords any warrant for such an inference. The probabilities are millions to one that no such definition or distinction, or any thought of either, ever occurred to the mind of any member of the convention.

We have already commented upon the great departure in the case of *Charles River Bridge v. Warren Bridge*, from the construction put upon the "obligation clause" in *Fletcher v. Peck* and the *College cases*.

In 1835 the language of the constitution was precisely what it was in 1837, but as names and forms cannot change substance in these two years, we lived under two materially different constitutions. These decisions, in 1837, filled Story with alarm. The truth is thus pithily stated by his son: "The fact that, in the only three constitutional questions which came before the court this session, my father found

himself compelled to deliver dissentient opinions, indicates very plainly that the constitutional views of himself and Marshall differed from those entertained by a majority of his present brethren upon the bench. * * * My father now became convinced that a new era had come, and that with the spirit which now animated the court he could not hope to agree with them upon constitutional points. His position was, therefore, rendered somewhat embarrassing, and he was very desirous to resign his office." * * * 2 Life of Story, 271.

Story himself says, in his letter to Harriet Martineau, of April 7, 1837: "I am the last of the old race of judges. I stand their solitary representative with a pained heart and a subdued confidence. So you remember the story of the last dinner of a club who dined once a year? I am in the predicament of the last survivor." *Ib.* 277.

In his letter to Judge McLean, of May 10, 1837, Story says: "There will not, I fear, ever in our day be any case in which the law of a state or of Congress will be declared unconstitutional; for the old constitutional doctrines are fast fading away, and a change has come over the public mind from which I augur little good. Indeed, on my return home I came to the conclusion to resign." *Ib.* 272.

In his letter of April 12, 1845, Story writes to his old friend Bacon: "I have long been convinced that the doctrines and opinions of the old court were daily losing ground, and especially those on great constitutional questions. New men and new opinions have succeeded. The doctrines of the constitution, so vital to the country, which in former times received the support of the whole court, no longer maintain their ascendancy. I am the last member now living of the old court, and I cannot consent to remain where I can no longer hope to see those doctrines recognized and enforced." * * * "I am persuaded that by remaining on the bench I could accomplish no good either for myself or for my country." *Ib.* 527-28.

In another paper we quoted from, and commented upon, certain peculiarities in the opinions in *Fletcher v. Peck*. It

would seem that five, at least, of the grounds upon which Marshall put the decision originated not with him, but the counsel. The argument of the counsel for the defence upon two of these points is thus reported by Judge Cranch (p. 123): "The legislature of Georgia could not revoke a grant once executed. It had no right to declare the law void; that is the exercise of a judicial, not a legislative, function. It is the province of the judiciary to say what the law *is*, or what it *was*. The legislature can only say what it *shall be*."

"The legislature was forbidden by the constitution of the United States to pass any law impairing the obligation of contracts. A grant is a contract executed, and it creates also an *executory* contract, which is, that the grantee shall continue to enjoy the thing granted according to the terms of the grant."

The opinion of Marshall certainly adds nothing to the clearness and force of these positions. But he apparently originated and coupled with them the points in relation to *ex post facto* laws, bills of attainder, and estoppel.

If a grant, which Webster, in the Charles River Bridge case, says is a donation, creates by implication a valid executory contract that the grantee shall enjoy this grant without impairment, or that the party of the first part shall not reassert the right of a grantor, the grantee is entitled to redress for the damages to which he may be put by a breach of that implied contract by the grantor. Does the phrase "implied contract" mean implied covenant; if not, what is the form of the remedy? If the title enures to the legislative grantee by estoppel, how can he recover for the loss of a title which he has not lost, and which, being vested, is so protected by the federal constitution that it can neither be taken away nor impaired? The idea of such a contract and estoppel is irreconcilable.

This was a suit at law, and not a proceeding on the equity side of the court. From the language used, the context, and the general drift of this branch of the opinion, it is hardly within the range of possibilities that Marshall referred,

in his opinion in *Fletcher v. Peck*, to what is now known as equitable estoppel, and which was almost, if not entirely, unknown in suits at law when that case was decided.

Chief Justice Perley, in *Horn v. Cole*, 51 N. H. 287, states with great force and clearness the character of, and distinction between, legal and equitable estoppels. He says: "The ground on which a party is precluded from proving that his representations on which another has acted were false is, that to permit it would be contrary to equity and good conscience. This has sometimes been called an *equitable estoppel*, because the jurisdiction of enforcing this equity belonged originally and peculiarly to courts of equity, and does not appear to have been familiarly exercised at law until within a comparatively recent date; and, so far as relates to suits at law affecting the title to land, I understand that in England and in some of the United States the jurisdiction is still confined to courts of equity." * * *

"So in a writ of entry: by the technical rules of law, if the demandant proves seizin in himself, and disseizin by the tenant within the time of limitation, he is entitled to judgment; but if the demandant, having a dormant title to the land demanded, concealed his title and encouraged the tenant to purchase from another, he is not allowed in our practice to set up his legal title, because it would be contrary to equity and good conscience.

"It thus appears that what has been called an equitable estoppel, and sometimes less properly an estoppel *in pais*, is properly and peculiarly a doctrine of equity originally introduced there to prevent a party from taking a dishonest and unconscientious advantage of his strict legal rights—though now with us, like many other doctrines in equity, habitually administered at law. But formerly the practice was different, and suits at law, the courts being unable to give effect to this equity, were often enjoined where the party insisted on his rights at law, contrary to the equitable doctrine.

"It would have a tendency to mislead us in the present inquiry, as there is reason to suspect that it has sometimes

misled others, if we should confound this doctrine of equity with the *legal estoppel by matter in pais*. The equitable estoppel and legal estoppel agree indeed in this, that they both preclude from showing the truth in the individual case. The grounds, however, on which they do it are not only different, but directly opposite." * * *

"Legal estoppels exclude evidence of the truth and the equity of the particular case to support a strict rule of law on grounds of public policy.

"Equitable estoppels are admitted on exactly the opposite ground of promoting the equity and justice of the individual case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth."

The probabilities are but little stronger that Marshall referred to the technical estoppels of the law. They were universally recognized at that time as odious, were strictly construed, and never favored. A seal does not necessarily estop him who seals. That a grantor may estop himself by a solemn admission of fact, or bind himself by an executory agreement embodied in a sealed instrument, was as well known then as now, and it is entirely immaterial whether the deed was a warranty, release, or quit-claim; but the naked grant had no such effect. Some have supposed that Marshall meant to assert the principle that there was an implied warranty of title alike in sales of personal and real estate. It is the generally recognized American rule, at the present time, that the seller of a chattel, *if in possession, but not otherwise*, warrants, by implication, that the title is in him. It is unnecessary to consider the numerous exceptions to this rule, and limitations upon it. Even in this qualified form it was not the settled rule, either in this country or Great Britain, when Marshall wrote his opinion; and even this rule; to use the emphatic language of Professor Parsons, "must be confined to sales of *chattels*. In the sale of *real estate* by deed there are no implied warranties." The language used seems rather to convey the idea of a contract raised by

implication, not from within the grant, but outside of it, as consequence of the fact that the grant, had been made in order to bring the instrument within the protection of the obligation clause which, as we believe, relates alone to executory contracts.

A comparison of the opinions and the position of the judges who sat in *Fletcher v. Peck* and *Trustees v. Woodward* shows a marked change in nine years. Marshall did not, in the College case, as in the former, put the decision upon several, but a single provision of the constitution. The positions that the acts were void because they were virtually bills of attainder, or *ex post facto* laws, the argument in support of which occupies so conspicuous a place in the opinion in *Fletcher v. Peck*, were apparently abandoned, at all events they disappeared, with the position that the state was estopped. But the implied contract, to which the question of estoppel was mistletoed in some mysterious way, still appears. Singular as it may seem, Mr. Justice Johnson descends from the pedestal of his "higher law"—the highest ever heard of, that "which will impose laws even on the Deity"—abandons his stout dissent from Marshall, in *Fletcher v. Peck*, in relation to the obligation clause, and concurs in the judgment in the College case "for the reasons stated by the chief justice." Whether this was the result of the compromise in *Sturges v. Crowninshield*, or in some other case, and, if so, how much was saved, because "the minority thought it better to yield something than risk the whole," we have no means of knowing.

[TO BE CONTINUED.]

*VI. SOME DISPUTED QUESTIONS OF EVIDENCE.**I. RELEVANCY.*

Sir J. F. Stephen, in his Indian Evidence Act of 1872, proposes the following rules as to relevancy :

“Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereinafter declared to be relevant, and of no others.

“Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place, or at different times and places.

“Facts which are the occasion, cause, or effect, immediate or otherwise, of relevant facts, or facts in issue, or which afforded an opportunity for their occurrence or transaction, are relevant.

“Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

“Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

“Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done, or written, by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the

persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy, as for the purpose of showing that any such person was a party to it.

"Facts not otherwise relevant are relevant: (1) if they are inconsistent with any fact in issue or relevant fact; (2) if by themselves, or in connection with other facts, they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

"In suits in which damages are claimed, any fact which will enable the court to determine the amount of damages which ought to be awarded is relevant.

"Where the question is as to the existence of any right or custom, the following facts are relevant:

"(a) Any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence;

"(b) Particular instances in which the right or custom was claimed, recognized, or exercised, or in which its existence was disputed, asserted, or departed from.

"Facts showing the existence of any state of mind—such as intention, knowledge, good-faith, negligence, rashness, ill-will, or good-will towards any particular person, or showing the existence of any state of body or bodily feeling—are relevant when the existence of any such state of mind or body or bodily feeling is in issue or relevant.

"Where there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant."

To Mr. Whitworth, an English barrister, we are indebted for the following modification of Sir J. F. Stephen's scheme:

"*Rule I.*—No fact is relevant which does not make the existence of a fact in issue more likely or unlikely, and that to such a degree as the judge considers will aid him in deciding the issue.

"*Rule II.*—Subject to Rule I, the following facts are relevant:

1. Facts which are part of, or which are implied by, a fact in issue; or which show the absence of what might be expected as a part of, or would seem to be implied by, a fact in issue.

2. Facts which are a cause, or which show the absence of what might be expected as a cause, of a fact in issue.

3. Facts which are an effect, or which show the absence of what might be expected as an effect, of a fact in issue.

4. Facts which are an effect of a cause, or which show the absence of what might be expected as an effect of a cause, of a fact in issue.

"Rule III.—Facts which affirm or deny the relevancy of facts alleged to be relevant under Rule II are relevant.

"Rule IV.—Facts relevant to relevant facts are relevant."

Sir J. F. Stephen, in his "Digest of the Law of Evidence," now gives the following as exhibiting his final views, adopting, in part, Mr. Whitworth's phraseology:

"Evidence may be given in any action of the existence or non-existence of any fact in issue, and of any fact relevant to any fact in issue, and of no others. * * * Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction or subject-matter, are relevant to the fact with which they are so connected. * * * Facts, whether in issue or not, are relevant to each other when one is, or probably may be, or probably may have been,

"The cause of the other;

"The effect of the other;

"An effect of the same cause:

"A cause of the same effect;

or when the one shows that the other must or cannot have occurred, or probably does or did exist, or not; or that any fact does or did exist or not, which in the common course of events would either have caused, or have been caused, by the other; provided that such facts do not fall within the exclusive rules," before stated, "or the exceptions," afterwards stated.

These exclusions and exceptions are afterwards thus specified: "*Similar but unconnected facts.* The occurrence of a fact similar to, but not specifically connected in, any of the ways hereinbefore mentioned with the facts in issue, is not to be regarded as relevant to the existence of such facts except in the cases specially excepted in this chapter." The exceptions are:

"Acts showing intention, good faith, etc.;

"Facts showing system;

"Existence of a particular course of business;

"Acts showing that a particular person assumed to be a public officer."

To the analysis just given, however, there are objections which I state in outline in my forthcoming work on Evidence (§ 26), and which I now expand. What is a "cause?" Is not the term open to at least two divergent meanings; and does not the value of the analysis before us depend upon our assuming one of these definitions to be true, where there are many reasons to regard it as untrue? The "cause" of a phenomenon, according to Mr. Mill, is the sum of all its antecedents. The objection to this, however, as is shown by Trendelenberg, in his acute essay on this topic, is, that as all nature is interdependent, everything thus becomes the cause of everything else; and, hence, as all things unite in this lateral causation, all evidence is relevant to every issue, and no issue can be narrowed to any particular line of evidence. On the other hand, if we mean by "cause," as I have heretofore argued in this REVIEW, such an interposition, by a responsible moral agent, as produces specifically the particular phenomenon in litigation, then to say that a particular fact is relevant to prove causation is assuming the very point in issue, which is whether the causation flowed from the particular fact.

Another criticism I would venture on Sir J. F. Stephen's analysis is, that the distinction made by him between "facts in issue" and "facts relevant to facts in issue" cannot be sustained. An issue is never raised as to an evidential fact; the only issues the law knows are those which affirm or deny

conclusions from one or more evidential facts. This is shown by Sir J. F. Stephen's own illustration: "A," he says, when explaining the supposed distinction, "is indicted for the murder of B, and pleads not guilty. The following facts may be issued: the fact that A killed B; the fact that at a time when A killed B he was prevented by disease from knowing right from wrong; the fact that A had received from B such provocation as would reduce his offence to manslaughter. The following facts would be relevant to the issue: the fact that A had a motive for murdering B; the fact that A admitted that he had murdered B; the fact that A was, after B's death, in possession of property taken from B's person." If we scrutinize the group of facts classified in the last quotation as "facts in issue," we will find that, as they are facts which could not be put in evidence; they are not relevant facts, though they might be relevant hypotheses to be sustained by relevant facts. If counsel should ask a witness whether "A killed B," the question would, if excepted to, be ruled out, on the ground that it called, not for "facts," but for a conclusion from facts, and to such conclusions witnesses are not permitted to testify. Equally summarily would be dismissed the questions whether "A knew right from wrong," and whether "A had received from B such provocation as would reduce his offence to manslaughter." The only way of proving either of these "fact in issue," as they are called by Sir J. F. Stephen, is by means of what he calls "facts relevant to the issue." Did A kill B? We cannot say that it would be relevant to the issue for a witness to say, "A killed B," for a witness would not be permitted so to testify. No facts are relevant which are inadmissible; and the fact that A killed B, being in this shape inadmissible, is irrelevant. It is, however, admissible—to take up Sir J. F. Stephen's illustration of facts relevant to the issue—to prove that A had a motive for murdering B; the fact that A admitted that he had murdered B; the fact that A was, after B's death, in possession of property taken from B's person. From such facts, taken in connection with facts which lead to the conclusion that A struck the blow from which B died, the

hypothesis that A murdered B is to be verified or discarded. The same line of observations is applicable to the second and third of the "facts in issue" mentioned by Sir J. Stephen. The proof of A's inability to distinguish right from wrong, and of the extenuation of his offence through hot blood, can only be made by proving "facts relevant to the issue" from which irresponsibility or hot blood can be inferred. We must, therefore, strike out from the category of relevant facts what Sir J. F. Stephen calls "facts in issue" or what may be more properly called pertinent hypotheses, and limit ourselves to the position that all facts relevant to the issue (or to pertinent hypotheses) are, as a rule, admissible. If we discard, as ambiguous, the word "fact" and substitute for it the word "condition" (corresponding to the logical "*differentia*" or incident), then the position we may accept is that *all conditions of a pertinent hypothesis are relevant to the issue, and that such conditions may be either proved or disproved.**

It may, however, be objected that the definition I now propose is ambiguous in the use of the word "pertinent;" and that, by the introduction of this term, I beg the question of the issue. I do not think so. By pertinent hypothesis I mean an hypothesis which, if proved, would logically influence the issue. Suppose, for instance, the question should arise before a duly constituted court, whether Mr. Wells, of the Louisiana Returning Board, was guilty of fraud in the alteration of returns. Relevancy in such an issue would be determinable, according to the definition I here propose, by free logic, and not by technical jurisprudence. The hypothesis set up by the prosecution in such a case would be that Mr. Wells, either for money or to gratify party zeal, tampered with the returns. If this hypothesis be sustained, the defendant, if the prosecution be properly conducted, would be deservedly convicted, and to sustain the hypothesis it would be admissible to prove any of its logical conditions. It would be relevant, for instance, to prove, as

* NOTE.—The above paragraph (as well as several others in the course of this article) is taken from the work on Evidence to which I have referred.

condition of the hypothesis of corruption, that Mr. Wells took money, or offered to take money, for his action as a return judge; or that he made, personally or through deputy, falsifications in the records; or that by his subsequent conduct he tacitly admitted such falsifications.

It will be seen, therefore, from the illustration just given that the conditions of a pertinent hypothesis, which are as such relevant to an issue, are either prior, contemporaneous, or subsequent. A debt, for instance, for goods sold, as is contended, is sued for. Among the prior conditions of the hypothesis (or contention) of indebtedness may be mentioned the possession by the plaintiff of the goods. As contemporaneous conditions are to be classed what we call the *res gestæ*, or circumstances of the sale. Among the subsequent conditions is the conduct of the debtor, more or less effectively admitting the debt. Or damages are claimed in a suit for injuring cattle by running them down on a railroad. Among the prior conditions of the liability are the unfenced condition of the road, and the running of the locomotive at full speed over the unfenced sections. Among the contemporaneous conditions are the *res gestæ*. Among the subsequent conditions is an admission of parties entitled to speak for the railroad company. In other cases we may regard as relevant conditions a party's subsequent conduct showing good or bad faith;¹ the subornation of witnesses to give a false account of a past transaction;² subsequent acts of adultery to prove a prior act of adultery;³ subsequent defamatory words to prove the *animus* of prior defamation.⁴

Of course, when the conditions of a pertinent hypothesis are relevant, it is relevant to prove conditions fatal to such an hypothesis. If Mr. Wells were on trial, for instance, it would be relevant to prove that he was absent from Louisiana at the time of the commission of the frauds on the fran-

¹ Gerish v. Chartier, 1 C. B. 13.

² Melhuish v. Collier, 15 Q. B. 878.

³ Boddy v. Boddy, 30 L. J. Pr. & Mat. 23.

⁴ Pearson v. Le Maitre, 6 Scott N. R. 607; 5 M. & Gr. 700; Warwick v. Foulkes, 12 M. & W. 507; Simpson v. Robinson, 12 Q. B. 511.

chise of that state ; or that he was himself the ignorant and unsuspecting dupe of others. Or, to turn to adjudicated cases, in a suit against a railroad corporation for negligently firing the plaintiff's farm, it is relevant for the defendant to prove the absence of conditions which would be the probable, if not necessary, conditions of such hypothesis. So, the defendant may show that his engines were so constructed as to make the profuse emission of fire highly improbable ; that the coals that escaped fell on the bed of the road, on which there was no accumulation of combustible material ; and that the fire by which the plaintiff was injured was traceable to the negligence of other parties. Or, when the hypothesis of the plaintiff is that, when A and B perished in the same ship at sea, A survived B, it is admissible for the defendant to show that before the shipwreck A was stronger than B ; that at the time of the shipwreck A was in a better place for the prolongation of life than B ; and that after the shipwreck there were traces of A having escaped the common and immediate death of those remaining in the ship. Or *alibi* being the hypothesis set up by the defence, it is admissible to prove even independent crimes committed by the defendant, if such proof refutes the hypothesis of *alibi*.⁵

One of the most interesting illustrations of the doctrine here laid down arises in cases in which accident or *casus* is set up as a defence. A forged note is passed, and the defence is : " I passed it ignorantly ; the whole thing was accident." Or a man is knocked down in the street, and his assailant, when put on trial, says : " This was all accident ; I was jostled against him in the crowd." Or a carrier fails to comply with a contract made by him to transport goods from point to point, and sets up *casus* or *vis major* as his excuse. In each of these cases it is admissible to meet the hypothesis of *vis major*, *casus*, or accident, set up by the defence, by showing in rebuttal a series of other cases forming part of a system with that in litigation, and to which, as a body, the defence in question would be absurd. The rule in such cases

⁵ R. v. Briggs, 2 M. & Rob. 199 ; R. v. Rooney, 7 C. & P. 517 ; and see Whart. on Ev. § 28.

is that, when a system is established, the conditions of other members of the system may be proved to affect the case in court, has been further illustrated in cases in which the customs of one manor are put in evidence to affect other manors of the same system. No rule is better established, or more frequently acted upon, than that which precludes the customs of one manor from being given in evidence to prove the customs of another; because, as each manor may have customs peculiar to itself, to admit the peculiar customs of another manor in order to show the customs of the manor in question would be inadmissible as a disconnected fact by the rule above stated, and would put an end to all question as to the peculiar customs in particular manors by throwing them open to the customs of all surrounding manors.⁶ But whenever a connection between the manors is proved, such customs become admissible. It is not enough, it is true, to show merely that the two lie within the same parish and leet; nor even that the one was a subinfeudation of the other; at least, unless it be clearly shown that they were separated after the time of legal memory, since otherwise they may have had different immemorial customs. On the other hand, the customs of manors become reciprocally admissible if it can be proved that the one was derived from the other after the time of Richard the First; and it has been also held, that if the customs in question be a particular incident of the general tenure which is proved to be common to the two manors, evidence may be given of what the custom of the one is as to that tenure for the purpose of showing what is the custom of the other as to the same.⁷

On the same principle, when value is in question, and when certain things are proved to belong to a system, then the market value of such other things is relevant for the purpose of determining the market value of whatever is part of the system.⁸ We must at the same time remember that

⁶ *Anglesey v. Hatherton*, 10 M. & W. 235.

⁷ *Ibid.*; *Stanley v. White*, 14 East, 338.

⁸ *Campbell v. U. S.*, 8 Ct. of Cl. 240; *Kansas Stockyard Co. v. Couch*, 12 Kans. 612; *Waterson v. Seat*, 10 Fla. 326.



a remote period, under different conditions, cannot in any view be taken as a standard,⁹ nor can peculiar associations, likely to give a factitious value, be taken into account.¹⁰ Distant markets cannot be consulted in proof of value;¹¹ though it is otherwise if the markets be in any way interdependent,¹² or sympathetic.¹³ Nor is it admissible for things of a different species to be taken into consideration in determining value;¹⁴ nor should much weight be attached to proof that prices had been offered in private negotiations by third parties; such evidence being open to fraud, and, at the best, indicating only private opinion, not the opinion of a market.¹⁵ And while hearsay is admissible to prove the state of a market,¹⁶ the value of an article, or the extent of a party's income, cannot ordinarily be inferred from the record of a tax assessment. This is the act of a third party, who must be called if obtainable.

A still more striking illustration of relevancy based upon system is to be found in the admissibility of collateral facts when such facts go to indicate constant natural laws. The seasons, for instance, pursue, in the long run, a regular course; and we may, therefore, presume that winter is cold and summer is warm; though this is open to proof that in an exceptional season the winter is comparatively mild, and the summer is comparatively cool. It may be that in a particular

⁹ *The Pennsylvania*, 5 Ben. 253; *White v. R. R.* 30 N. H. 188; *French v. Piper*, 43 N. H. 439; *Paine v. Boston*, 4 Allen, 168; *Benham v. Dunbar*, 103 Mass. 365; *Dixon v. Buck*, 42 Barb. 70; *Columbia Bridge v. Geisse*, 38 N. J. L. 39. See *Potteiger v. Huyett*, 2 Notes of Cas. 690; *Abbey v. Dewey*, 25 Penn. St. 413; *East Brandywine R. R. v. Ranck*, 78 Penn. St. 454.

¹⁰ *Palmer v. Ferrill*, 17 Pick. 58; *McCracken v. West*, 17 Ohio, 16.

¹¹ *Davis v. Sherman*, 7 Gray, 291; *Fowler v. Middlesex*, 6 Allen, 92. See, generally, *Kent v. Whitney*, 9 Allen, 62; *Boston R. R. v. Montgomery*, 119 Mass. 114; *Freyman v. Knecht*, 78 Penn. St. 141; *Shenango v. Braham*, 79 Penn. St. 447; *Baber v. Rickart*, 52 Ind. 594; *McLaren v. Birdsong*, 24 Ga. 265.

¹² *Harrington v. Baker*, 15 Gray, 538; *Greeley v. Stilson*, 27 Mich. 153.

¹³ *Siegbert v. Stiles*, 39 Wis. 533.

¹⁴ *Cliquot's Champagne*, 3 Wall. 114; *Kermott v. Ayer*, 11 Mich. 181; *Sisson v. R. R.*, 14 Mich. 489; *Comstock v. Smith*, 20 Mich. 338.

¹⁵ *Gouge v. Roberts*, 53 N. Y. 619.

¹⁶ *Perkins v. People*, 27 Mich. 386.

winter, even in a northern climate, we may have no snow-storms; yet we infer that what is usual is continuous, and not only do we take each fall the steps that will enable us to shelter ourselves against snow, but we assume as to any given past winter that there fell in it the usual quantity of snow. So with regard to ice. In New England, for instance, ice crops are usually formed each winter, and these may be stored if due diligence be shown; and on a suit based on lack of diligence in this respect it would be inferred, until the contrary was shown, that the winter was cold enough to produce the usual quantity of ice. Hence it is that *casus*, or the extraordinary interruption of apparent physical laws, must be affirmatively shown by the party alleging such interruption; and, until such proof, that which is usual is deemed to be constant. In order, however, that evidence based on the constancy of nature should be received, similarity of conditions should be first established. Thus in an action to recover damages for injury caused by removing stones from a river, resulting in the washing away the plaintiff's land, it has been held not error to exclude evidence of the effects of the action of the water at another place and time, the forces and surroundings not being first shown to be alike.¹⁷

One of the most difficult questions that arises in this connection is that which is presented when, to prove that the negligent dropping of fire by a locomotive was the cause of a particular conflagration by which adjacent property was consumed, the effort is made to put in evidence prior fires caused unquestionably by sparks proceeding from engines traveling the same road. Evidence of this class may be offered so as to meet two distinct phases of fact. The first is when a plaintiff, after proving that his house was fired by sparks emitted by engine No. 1 on the defendant's road, offers to show that on several former occasions sparks were emitted by the same engine in such profusion as to lead to the inference that the engine was either defectively con-

¹⁷ See *Hawks v. Inhabitants*, 110 Mass. 110. On the general topic, see Mill's *Logic*, ch. xiv.

structed or carelessly driven. In such case we must hold the evidence to be admissible. The fact that the engine has frequently caused damage of this kind indicates defects in its construction which impose upon its owner, if not its condemnation, at least the exercise of peculiar care both in its repair and its management; and that such care was applied, though a burden, after proof of frequent fires caused by the same engine, is on him to show. On the other hand, suppose that after the plaintiff proves a firing from engine No. 1, he offers to show a series of prior firings from engines Nos. 2, 3, 4, 5, and 6, without offering to show that there was such identity of construction of the engines, as a mass, as to make it probable that the defects in engines Nos. 2, 3, 4, 5, and 6 existed in engine No. 1. In such case the proof of firing from any other engine than No. 1 would be as irrelevant as, in an action by A for hurt from a kick of a horse belonging to B, it would be irrelevant to show that on other distinct occasions other horses of B had kicked C, D, and E.¹⁸

There is, however, another contingency in which the argument from system does not apply. Suppose, for instance, that when evidence of prior firings by certain specific engines is offered, there is no identification, on the part of the plaintiff, of the engine by which the fire was emitted; or suppose that, though that particular engine is identified, there is no identification of the engines causing the prior fires, is the evidence relevant? We have now to touch a question of probabilities which has already been noticed, and we may adduce, in explanation, the same illustration. Although there were one hundred thousand people of a particular class at a particular place at a particular time, yet it is relevant to prove that A was at that place at that time when the question is whether A did something that could only have been done at that place and time. So, when an offer is made to show a series of firings from a series of unidentified locomotives on the same road, such offer is relevant as one of the conditions of an hypothesis which charges a particular locomotive with

¹⁸ *Erie R. R. v. Decker*, 78 Penn. St. 293. See *Waugh v. Shunk*, 20 Penn. St. 130; *Carson v. Godley*, 26 Penn. St. 111.

the firing. Of weight, if disconnected with other evidence, it cannot be; relevant, for the reasons just stated, it certainly is. "The third assignment of error," so speaks Mr. Justice Strong, in giving an opinion to this effect in the Supreme Court of the United States in 1876,¹⁹ is "that the plaintiffs were allowed to prove, notwithstanding objection by the defendants, that at various times during the same summer, before the fire occurred, some of the defendants' locomotives scattered fire when going past the mill and bridge, without showing that either of those which the plaintiffs claimed communicated the fire were among the number, and without showing that the locomotives were similar in their make, their state of repair, or management, to those claimed to have caused the fire complained of. The evidence was admitted after the defendants' case had closed. But, whether it was strictly rebutting or not, if it tended to prove the plaintiffs' case, its admission as rebutting was within the discretion of the court below and not reviewable here. The question, therefore, is whether it tended in any degree to show that the burning of the bridge and the consequent destruction of the plaintiffs' property was caused by any of the defendants' locomotives. The question has often been considered by the courts in this country and in England, and such evidence has, we think, been generally held admissible as tending to prove the possibility, and a consequent probability, that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company."²⁰ Or, again, if the defendants should set up the hypothesis of *casus*, or of one of those occasional mechanical aberrations which due diligence cannot exclude, then it is relevant to show, as militating against this hypothe-

¹⁹ Grand Trunk R. R. v. Richardson, 91 U. S. (1 Otto) 454.

²⁰ As concurring in this conclusion may be cited: Aldridge v. R. R., 3 Man. & G. 515; Pigott v. R. R., 3 M. & W. 229; Boyce v. R. R., 42 N. H. 97, 43 N. H. 627; Cleaveland v. R. R., 42 Vt. 449; Sheldon v. R. R., 14 N. Y. 218; Field v. R. R., 32 N. Y. 339; Westfall v. R. R., 5 Hun (N. Y.), 75; Hayatt v. R. R., 23 Penn. St. 373; R. R. v. Williams, 42 Ill. 358; St. Jos. R. R. v. Chase, 11 Kans. 47; Longabaugh v. R. R., 9 Nev. 271; Penn. R. R. v. Stranahan, 32 Leg. Int. 449; 2 Weekly Notes, 215.

sis, that other engines, constructed on the same general system as that by which the engine occasioning the fire was constructed, had emitted sparks to an extent from which negligence in the construction of the engines, if not in the care of them, may be inferred.²¹ To meet another probable hypothesis such evidence may be relevant. It may be maintained by the defendants that the object fired was beyond the reach of sparks from their engine. In answer to this it has been held relevant for the plaintiff to prove that, at some time before, the defendants' engines, when passing the same point, emitted sparks which fell further than the building from whose firing the plaintiff sues.

II. PRESUMPTIONS OF FACT AND PRESUMPTIONS OF LAW.

The fallacy which logicians call "confusion of terms" has had a peculiarly mischievous influence in dealing with the doctrine of Presumptions. I have taken occasion, in my discussion of this topic in my work on Evidence, to show that the term *presumptio*, in its classical sense, means exclusively a rule of law adopted for the purpose of determining the burden of proof. In the course of time, however, it has received meanings so various that it would be well if the term could be dropped. The ambiguity in the term "presumption," already discussed by me, is thus noticed by Mr. Mill:²² "To be acquainted with the guilty is a *presumption* of guilt; this man is so acquainted, therefore we may *presume* that he is guilty; this argument proceeds on the supposition of an exact correspondence between *presume* and *presumption*, which does not really exist; for 'presumption' is commonly used to express a kind of *slight suspicion*, whereas 'to presume' amounts to absolute belief." Whether Mr. Mill is right in his definition of "presume" and "presumption" need not now be considered. It is enough for the present purpose to say that the words, even if not d

²¹ *Ross v. R. R.*, 6 Allen, 87; *Sheldon v. R. R.*, 14 N. Y. 218; *Burke v. R. R.*, 7 Heisk. 451. See *Piggott v. R. R.*, 10 Jurist, 571; 3 Man. Gr. & 229; *Aldredge v. R. R.*, 3 M. & G. 515.

²² Mill's Logic, II, 442.

inguishable in the way. Mr. Mill states, go to a jury, if left without explanation, open to meanings from which conclusions diametrically opposite can be drawn. The term "law" may be used, in connection with presumptions, in three senses: (1) A presumption of law, in its technical sense, is, as we have seen, a presumption which jurisprudence itself supplies, irrespective of the concrete case, to certain general conditions whenever they arise. (2) But a presumption of law may be also a presumption of fact which jurisprudence permits; and it is the practice of judges to say that a presumption of fact is "legal"—*i. e.*, that it is one the law will sustain. (3) "Law," as we have already seen, may be used as including the laws of nature and of philosophy, as well as those of formal jurisprudence. Juries are constantly told, for instance, that certain conclusions of mental or physical science are presumptions of law; and in this way they are led to suppose that such conclusions bind, as absolute rules of jurisprudence, the particular case, no matter what may be the phases the evidence may assume.

That the difference between presumptions in law and presumptions in fact is not formal, but real, will be seen by the following analysis:

1. A presumption of law derives its force from *jurisprudence* as distinguished from *logic*. A statute, for instance, may say that a person not heard of for ten years is to be counted as dead. This is a presumption of law, and is arbitrarily to be applied to all cases where parties have been absent for such period without being heard from. If there be no such statute, then logic, acting inductively, will have to establish a rule to be drawn from all the circumstances of a particular case. Or a statute may prescribe that all persons wearing concealed weapons are to be presumed to wear them with an evil intent. This would be a presumption of law, with which logic would have nothing to do. On the other hand, whether a particular person, who carries a concealed weapon, there being no statute, does so with an evil intent, is a question of logic—(*i. e.*, probable reasoning, acting on all the circumstances of the case)—with which technical

jurisprudence has no concern. It is not necessary, however, to a presumption of law that it should be established by statute, in our popular sense of that term. Statute, in a broad sense, includes juridical maxims established by the courts as much as juridical maxims established by the legislature. To make, however, a maxim established by the courts in this sense a statute, it must be not only definitely promulgated by judicial authority, but finally accepted; such maxims being, to adopt Blackstone's metaphor, statutes worn out by time, the maxim remaining, though the form part of the statute has disappeared. The prominent maxims of this kind are the presumption of innocence and the presumption of sanity. Presumptions of law, therefore, are uniform and constant rules, binding only generically. Presumptions of fact, on the other hand, are the conclusions drawn by free logic, binding only specifically.

2. To a presumption of law probability is not necessary but probability is necessary to a presumption of fact. *Pro est quem nuptiae demonstrant*. This is a presumption of law and this presumption holds good even in cases where such paternity is highly improbable, if it should be possible. We can conceive of cases in which it is highly improbable that an accused person should be innocent of the crime with which he is charged; yet probable or improbable as guilt may antecedently appear, he is presumed to be innocent until he is proved to be guilty. On the other hand, with probability there can be no presumption of fact. A man is not presumed to have intended an act, for instance, unless it is probable he intended it.

3. Presumptions of law relieve either provisionally or absolutely the party invoking them from producing evidence. Presumptions of fact require the production of evidence as preliminary. The presumption of innocence, for instance, makes it provisionally unnecessary for me to adduce evidence of my innocence. On the other hand, until I am proved to have done a thing there can be no presumption against me of intent. Evidence, therefore, which is necessary antecedent to presumptions of fact, is attached

presumptions of law only as a consequent. Until the evidence is adduced there can be no presumption of fact; there is no presumption of law that is not applicable before the evidence is adduced.

4. The conditions to which are attached presumptions of law are fixed and uniform; those which give rise to presumptions of fact are inconstant and fluctuating. For instance, all persons charged with crime are presumed to be innocent. Here the condition is fixed and uniform; it involves but a single, incomplex, unvarying feature, *charged with crime*; it is true as to all persons embraced in the category. On the other hand, the presumption of fact, that *doing* presumes *intending*, varies with each particular case, and there are no two cases which present the same features. Persons charged with crime may be sane or insane, may be adults or infants, may be at liberty or under coercion; in each case, so far as concerns the presumption of law, they are persons charged with crime, and the presumption applies equally to each. But whether a person doing an act is sane or insane, is an adult or an infant, is at liberty or under coercion, is essential in determining intent. Presumptions of fact, in other words, relate to unique conditions, peculiar to each case, incapable of exact reproduction in other cases; and a presumption of fact applicable to one case, therefore, is inapplicable, in the same force and intensity, to any other case. But a presumption of law relates to whole categories of cases, to each one of which it is uniformly applicable, in anticipation of the facts developed on trial. Thus, for instance, all children born in wedlock are presumed by law to be legitimate until the contrary be proved; and this presumption applies to all children so born, no matter who they may be. On the other hand, whether a bastard is born of a particular father is determinable usually by presumptions of fact attachable to conditions as to which not two cases present precisely the same type.

Both the fallacy and the mischief of the doctrine I am contesting are signally illustrated by the way in which, by force of this doctrine, intention, which is eminently a matter

of fact, has been turned into a matter of law. We are told that it is a presumption of law that intentional hurt done to another is malicious. Now, this is either a *petitio principii* telling us that something is malicious because it is malicious, or the argument rests on the major premise, that all hurts are malicious, which is untrue in fact. The only legitimate presumption we can draw in such cases is a presumption of fact, viz., that it is probable, from the circumstances of the case, that malice existed. The fallacy of turning an inference of fact, in respect to intent, into a presumption of law may be thus illustrated: "All men who kill do so maliciously. A has killed B; therefore he has done so maliciously." This is the argument as to intent put syllogistically. But this may be indefinitely varied; and of the variations we may take the following, some of which have been sanctioned by the courts: "Men who fly when accused are guilty. A flies when accused; therefore," etc. "Accused parties who fabricate evidence are guilty of perjury. A has done this; therefore," etc. Or, "He who has a motive to commit a crime commits it. A had a motive to commit a particular crime; therefore A," etc. Or, "He who was in the neighborhood at the time of the crime committed it. A was in such neighborhood; therefore A," etc. Now, no one doubts that it is admissible, as a series of facts from which guilt may be logically inferred, to prove that the defendant had a motive to commit the crime, and that he was in the neighborhood at the time the crime was committed; nor can it be disputed that the inference of guilt in the latter case is the same in kind, the inference of guilty intent from the mere fact of firing a shot. We must, therefore, either treat all presumptions of fact as presumptions of law, or we must remove the presumptions of malice and of intent to their proper place among presumptions of fact. Our office, in other words, in all questions of motive and purpose, is, as has been said, not deduction, but induction. It is not, "All members of class A have a specific intent, and this act being of class A, consequently has such intent;" but it is, "The circumstances

stances of the case before us make it probable that the act was done intentionally." The process is one of inference from fact, not one of predetermination by law.

The fallacy which has just been noticed pervades the civil as well as the criminal side of our law. Thus we are told by an authoritative writer that "the *deliberate* publication of a calumny, *which the publisher knows to be false*, raises, under the plea of 'Not guilty' to an action for libel, a conclusive presumption of malice."²³ Now, here again is either a mere *petitio principii*, being equivalent to saying, "A falsehood uttered deliberately and knowingly is a falsehood uttered deliberately and knowingly," or we have exhibited to us, not a "conclusive," but a rebuttable, presumption of malice. Undoubtedly the fact that a document, attacking the character of another, is published by a mere volunteer, is ground from which malice may be inferred. But this fact is not always enough to make out malice, for, when the publication is privileged, then, in order to show malice, facts inconsistent with *bona fides* must be proved.²⁴ Whether there is malice, therefore, even by force of the very line of cases before us, is a question of fact, determined by the evidence in the particular case. Another illustration of the same error may be noticed in an English ruling, that fraud is to be inferred wherever one man tells an untruth to another for the purpose of obtaining the latter's goods.²⁵ Here, again, we have the same dilemma. Either the ruling, if it means that he who intends to cheat has the intention of cheating, is a bare *petitio principii*, or it rests on a false premise, namely, that a man, who by means of an untruth obtains another's goods, intends to cheat, in the teeth of the fact that there are innumerable cases in which untruths are uttered unconsciously, or as mere brag, or as matters of opinion, in which cases it is held that the intention to cheat

²³ Taylor's Evidence, § 71, citing *Haire v. Wilson*, 9 B. & C. 643; *R. v. Shipley*, 4 Doug. 73, 177; *Fisher v. Clement*, 10 B. & C. 475; *Baylis v. Lawrence*, 10 A. & E. 925.

²⁴ *Bromage v. Prosser*, 4 B. & C. 247; *Spill v. Maule*, L. R. 4 Ex. 232; *Whitefield v. R. R.*, 1 E., B. & E. 115.

²⁵ *Tapp v. Lee*, 3 Bos. & Pul. 371. See *Pontifex v. Bignold*, 3 M. & Gr. 63.

is not proved.²⁶ In this case, also, we have the process deduction erroneously substituted for induction, by which alone, as we have seen, conclusions as to intent can be reached.

It will be seen, therefore, that a presumption of law is a judicial postulate that a certain predicate is universally assignable to a certain subject. A presumption of fact is an argument from a fact to a fact. That the scholastic jurists should have overlooked this important distinction is natural. They were mostly casuists, proficient in realistic philosophy, framed to construct endless groups of hypothetical cases and to conceive of each group as having a real existence. Such groups it was their office to classify, and to each group to attach certain judicial *differentia*. In addition to this, at a time when judges were comparatively untutored, and when they had control over facts as well as law, it seemed desirable to limit as far as possible their discretion by attaching specific combinations of facts certain fixed legal attributes. To understand how completely the prevalent classification of presumptions has been borrowed from scholastic, as distinguished from classical, authorities, it is proper to examine specifically the authors on whom our most authoritative treatise writers, when treating of presumptions, rely.

Of the scholastic jurists, the earliest to whom our treatise writers appeal is Accursius (1180-1260). Most of the probable reasons which come in the way of this learned glossarist are treated by him as presumptions of law. Among these we may notice the following :

Intent to be presumed on proof of killing, but it may be rebutted by *praesumptiones, probando amicitiam et affinitatem et qualitatem occidentis*.

Constancy of disposition is a presumption of law because *praesumitur quis remanere in eadem voluntate*.

Due execution of an instrument is presumed as matter of law because *praesumitur solemnitas*.

Praesumitur ex eo quod plurimum accidit, ex eo quod fieri solet.

²⁶ See those cases enumerated in detail in Whart. Cr. Law (7th ed.) §§ 2118, 2133.

Quis semper ignorare praesumitur, nisi scire probetur.

Praesumitur ex eo quod plurimum accidit, ex eo quod fieri solet.

Tancred, a Bolognese jurist and ecclesiastic, whose work on the *ordo judicarius* was written in 1324, though not published until 1515, is also frequently cited by our text writers to sustain their acceptance of the dominant view. Tancred rests his numerous conclusions on the following axioms: Omne bonum factum recte praesumitur actum; omne malum factum prave praesumitur actum. It is astonishing that English judges and jurists should quote such maxims without noticing how preposterous is the fallacy they contain. Putting them into plain English, Tancred's maxims are a vicious circle of the coarsest texture. They are simply this: "All good acts are good; all bad acts are bad." Yet, as we have seen, this is no worse than saying, "All intentional acts are intentional; all malicious acts are malicious."

Alciat, or Alciatus, who is prominently cited by Mr. Best, in his treatises on Presumptions and on Evidence, was an Italian jurist (1492-1550), renowned as the founder of a school of jurisprudence which united literary elegance with judicial research. In his treatise *de præsumptionibus* he discusses at large *præsumptiones juris et de jure* and *præsumptiones juris*, recognizing at the same time as authoritative the Aristotelian distinction between *probatio inartificialis* and *probatio artificialis*. A presumption *juris et de jure*, he tells us, is one established by law, and is called *de jure* because "super tali præsumptione lex inducit firmum ius et habet eam pro veritate." This kind of presumption is the "dispositio legis aliquid præsumentis et super præsumpto tanquam sibi comperto statuentis," and is irrebuttable. A *præsumptio juris*, however (rebuttable presumption of law), is a "probabilis conjectura ex certo signo proveniens, quæ alio non adducto pro veritate habetur." It must be *probable*, and with its probability increases its force; it must be a *conjectura*, and not absolute proof; it must be *ex certo signo proveniens*; Alciatus properly holding that, to enable a presumption of

NOTE.—See these and others quoted in Burckhard, *Presumptionen*, 14-15.

law to operate, it must rest upon a stable base of fact. But at this point Alciat opens the way to subsequent errors in holding (naturally enough to him, at an era when the principles of law as the philosophy of social experience, and law as jurisprudence, were not clearly distinguished) that every *probabilis conjectura* is a *præsumtio juris*. As to the *præsumtio hominis* he does not discourse; but among *præsumptiones juris* he enumerates certain *probabiles conjecturæ* which are based, not upon jurisprudence, but upon social science. These he seeks to subordinate to three rules: "*prima regula*, quod qualitas, quæ naturaliter inest homini, semper adesse præsumitur; *secunda*, quod mutatio non præsumitur; *tertia*, quod semper fit præsumtio in meliorem partem." Among the illustrations of the first rule he mentions parental love, a result of which it is to be presumed that the disinheriting of a child is intended *bona mente*, and that the education given by a parent to a child is gratuitous. As an illustration of the second rule he announces it to be a presumption that every man cares more for his own business than that of another entrusted to him, and that when two persons perished together the strongest will be presumed to have survived. In applying the rule *mutatio non præsumitur* he specifies as presumptions of law "*semel malus, semper malus*," "*olim obligatus, hodie obligatus*," "*olim dominus, hodie dominus*." Undoubtedly these are presumptions of fact, to be drawn more or less convincingly from the circumstances of each particular case. They are, therefore, presumptions we are led to make from our observation of society, and, in practical life, business would be at a standstill unless they were employed. *Mutatio non præsumitur* so Alciat correctly tells us; but the base from which the presumption starts has none of the fixedness and constancy necessary to the support of a presumption of law, defining law as jurisprudence. On the contrary, *mutatio non præsumitur* varies with each case, because susceptibility to change is a quality which is possessed to the same degree scarcely any two objects we can enumerate. *Mutatio non præsumitur* we may say as to the procession of the seasons

in order, but not as to any particular kind of weather in a particular season.

Menoch (Menochius), born in Paris in 1532, afterwards senator and counsellor in Milan, dying in 1607, is the author of a copious treatise, in six books, "de presumptionibus, conjecturis, signis, et indiciis." From Menoch has been drawn no small part of the English law on this branch of evidence. His first book treats of the general principles of presumption, filling with these a folio of large size. The remaining four books classify presumptions as follows; quæ versantur (1) circa judicia; (2) circa contractus; (3) circa ultima dispositiones et voluntates morientium; (4) circa delicta et maleficia. The last book is devoted to miscellaneous presumptions which cannot be included within this classification. He adopts the Aristotelian divisions, as applied by Quintilian, between artificial and inartificial proof; and he holds that this division is substantially recognized in the classification, which he adopts, of presumptions as *juris et de jure, juris*, and *hominis*. The *præsumtio juris et de jure* he defines as a necessary conclusion from a fixed state of facts; the *præsumtio juris*, and the *præsumtio hominis*, as each a probable conclusion from a fixed state of facts. The *præsumtio juris* is distinguished from the *præsumtio hominis* in this, that the first is, and the second is not, expressly established by statute. As, however, the statutes cannot embrace all possible cases, then, when a presumption is not included in the letter of the statute, but is analogous to one so included, it is to be treated as within the statute; a concession which, as Burckhardt remarks,* obliterates the distinction between the *præsumtio juris* and the *præsumtio hominis*. As to the interesting question as to the seats or bases from which presumptions may be drawn, he enumerates the following six as exhaustive: (1) persona; (2) causa; (3) factum; (4) dictum; (5) non-factum; (6) non-dictum. That this division embraces social and physical science under the term "law" is plain from the illustrations which are appended.

* NOTE.—Civilistische Presumtionen, 33, to which work I am indebted for part of the above analysis.

It is presumed, we are told, *a personæ qualitate*, that an old person dies before a youth; that a woman is less resolute than a man; that the weaker of two combatants did not begin the fight, that *semel malus, semper melius* (a maxim that is reproduced by Rochefoucault). Under the head of *causæ* are enumerated a series of conclusions based on the sciences of psychology; and the probable results of *amor, spes, and metus* are detailed. As to *metus*, we have announced a presumption that a young woman loses her chastity only by force. *Ex facto* come the following: *factum sequens declaratur voluntatem præcedentem*; *a præsentis ad præteritum et futurum præsumitur*; and even *a futuro ad præsens et præteritum præsumitur*.*

The following psychological inference is introduced by Menoch as a presumption of law: *non præsumendus est quod non prius mente agitaverit*; a proposition which has been the cause of much confusion in our law. Anglo-American jurisprudence. It is sufficient here to say that the term "law" is so defined by Menoch as to include sociology, psychology, and physical science, and that, in presumptions of law, he treats psychological, social, and physical inductions. No doubt a statute may take an induction so borrowed, and, in order to relieve the parties from proving that which is reasonably settled, make it a presumption of law. When two persons are exposed on one plank to the dangers of the sea, and both die, the probability is that we infer, that the stronger survives the weaker. We may base this probability on the instinctive love of life, which leads the stronger to use his superior strength to secure survivorship; or on the physical laws of the human frame which generally give longer endurance to the stronger. These, however, are presumptions of fact, which vary with each particular case. The legislature, however, in order to simplify litigation, and to give an arbitrary test by which something like uniformity of result may be reached, may enact by statute that in such cases the survivorship is to

* NOTE.—Menoch, qu. 19.

determined by certain fixed rules. The presumption in such case is one, not of fact, but of law. The law may be very absurd, and may conflict with the conclusions of those sciences which are most capable of judging such issues; but, whether absurd or not, it is binding. Here, then, is the distinction which escaped Menoch, from the fact that he embraced all science and experience under the term "law." A presumption of law, in its true sense, is a presumption which, whether probable or improbable, is applied by statute, or by that which is equivalent to statute, to a fixed and constant condition of facts. A presumption of fact is a presumption applied by logic, aided either by common experience or by scientific research, to the exceptional and unique facts of each particular case.

If it be objected that I have exhibited in too great detail the views of the scholastic jurists from whom our prevalent classification of presumptions is taken, the answer is that it is only by such an exposition that the true character of the scholastic system can in this relation be known. Eminent English text writers, for instance, cite Menoch and Alciat as authority for the proposition that intent is a presumption of law; and, in fact, when we go back to the earlier English cases announcing this maxim, we find that its sole authorities are the scholastic commentators to whom I have just referred. We are led, therefore, to suppose (1) that maxims such as these have the authority of the Roman law, and (2) that they are part of a symmetrical system of jurisprudence based, as all practical jurisprudence must be, on the recognition of the coördinate power of the factors of law and of fact. But (1) the maxims in question, and the classification of presumptions to which they relate, are unknown to the Roman law, and are the creatures of the speculative scholasticism of the middle ages; and (2), what is more important, they are part of a false system which ignored reason as a coördinate factor in concrete adjudication, and which undertook to decide by a pre-announced rule of law every possible contingent question of fact. To these errors are attributable the multitudinous "presumptions of law" of the scholastic jurists; to

this we owe those immense volumes of judicial casuistry which have done so much to mislead English writers on evidence.

The restoration of the classical and philosophical doctrine in this respect is by a process not unlike the restoration under Niebuhr's auspices, of the treatise of Gaius, of which so much was used in the Justinian compilation. The parchment on which the full text of Gaius was written had been covered by monkish legends, while the original writing had been apparently obliterated. By diligent and skilful labour, however, the monkish legends have been removed and the text of Gaius restored. If we are bound by authority, then our duty is to perform the same office with the mediæval text books by which, in this branch of law, our conclusions have been so long perverted. We must get rid of the crust of false scholasticism by which the true authorities have been hidden, and restore those authorities in the purity of their text. If we are not bound by authority, then let us toss away the mediæval as well as the classical jurists; let us, at least, regain our logic. If there is no technical jurisprudence fettering us to a particular theory of presumptions, then we must fall back on reason, and hold that only what is a thing presumed to be true when its truth can be proved.

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VII. RIPARIAN RIGHTS.

To every thoughtful student of the law it has an aspect of the absurd. He is made sensible of this when he contemplates it with reference to the tenacity with which it clings to time-honored custom, usage, and ancient precedent.

A law which arose out of the necessities of a people centuries ago—out of a civilization, or semi-civilization, with customs, manners, wants, and adaptabilities as different from the present as midnight darkness from the noon-day sun—is laid down as the rule for to-day. It matters not that the peculiar people, their domestic and foreign policy, the habits and necessities of their existence, and their place of abode, have all passed away or been changed. As a partial illustration of this, we instance the subject of the present paper.

The common-law doctrine of the rights of riparian owners had its inception and growth largely in the wants of the English people and the peculiar conformation of the Island of Great Britain, at a time before steam vessels were known, and little of engineering skill possessed by the people, and when a commercial marine was thought impracticable.

It was then, when sail vessels were unable to make headway against the current of the short and rapid streams of this island, that rivers were said to be navigable only to the extent of the ebb and flow of the tide—a fiction that is daily being announced as truth, from the bench in this country, of all our great rivers, the Mississippi included.

We know that this is said to be so only in *law*, not in *fact*. But we appeal to the sober thought and common sense of the jurists of our country, whether it is not time that they should cease to say “in law, though not in fact.” What is true in fact, except when the distinction is made with reference to an equivocal use of language, should be true in law.

The annunciation that a thing is true in fact, but not in law, is a concession to roguery, and should be a cause of ridicule of the judge.

There is, perhaps, no more instructive and interesting chapter of our law than that which contains the various learning, the profound research, and subtle sophistry which it is sought to give plausibility and applicability to this country to the common-law doctrine on this subject.

Most laws have, as all laws should have, some basis of reason—in the wants of the people, the peculiar circumstances giving their existence, or in some theory of “the eternal fitness of things.” When they fail in any or all of these they should be wiped out, and something better take their place.

Time-honored custom and usage, or ancient precedents are not sufficient reasons for their perpetuation. The statesman and the superior judge should rise above this dictation to meaningless form—ancient, and objectless, and inapplicable to usage. He may not always circumscribe his action by his peculiar views or judgment in every case. This would lead to an unsettling of all law. Many questions arise in which the reasons are about equally balanced, in which the reason of the living judge may conflict with that of the dead or as represented in the pages of our reports and text-books. In such cases he will usually follow precedent. But when the question arises, and when the alternative exists, that he must choose between reason, perhaps right and justice, and precedent—precedent having, it may be, its origin in a state of things entirely different from the present, or in which the reason of the thing has ceased to exist—then he will follow his own judgment and reason.

In the case of the *Railroad Company v. Schurmeir*¹ the court says: “Irrespective of the acts of Congress, it should be remarked that navigable waters, not affected by the ebb and flow of the tide, such as the great lakes and the Mississippi river, were unknown to courts and jurists. When the

¹ 7 Wall. 288.

rules of the common law were ordained, and even when the learned commentaries were written, to which reference is made,² it was the settled doctrine of this court that the admiralty had no jurisdiction except where the tide ebbed and flowed."

Anciently, the sea, with the tide rivers, which were considered its arms, were said to belong to the king (1. Black. Com. 107), and this idea has become the recognized law of all nations. In this country the public or commonwealth is substituted for the king. The reason of the rule lies in the natural fitness of things—in the organization of nations and a consideration of the necessities of the people, trade, commerce, social and other intercommunication.

Things not susceptible of individual use, but useful to the public generally, and essentially so, are dedicated to the public, and held exempt from individual appropriation.

One of the earliest, and perhaps the most reliable of authors upon this subject, whose words in England, and to some extent in this country, are quoted with as much weight almost as if they were found in *Magna Charta*, to accept the sentiment of another, and of whom it has been said that his writings almost justify the extravagant encomium which Mr. Wirt passed upon him as judge, that, "with a mind beaming the effulgence of noon-day, he sat upon the bench like a descended god," lays down the common-law doctrine as follows. I quote from Sir Mathew Hale's *De Jure Maris*.³ Of the sea he says :

"The sea is that which lies within the body of a country or without. That arm or branch of the sea which lies within the *fauces terræ*, when a man may reasonably discern between shore and shore, is, or at least may be, within the body of a country; and, therefore, within the jurisdiction of the sheriff or coroner.

"The part of the sea which lies not within the body is called the main sea or ocean.

² The *Jefferson*, 10 Wheat. 428; *Genesee Chief*, 12 How. 456; *Hine v. Trevor*, 4 Wall. 565.

³ See *Ex parte Jennings*, 6 Cow. 536.

"The narrow sea adjoining the coast of *England* is part of the waste and demesnes and dominions of the king of *England*, whether it lie within the body of the country or not."

"The king's right of property or ownership in the sea and the soil thereof is evinced principally in these things that follow."

"*First.* The right of fishing in the sea, and the creeks and arms thereof, is originally lodged in the crown, as the right of depasturing is originally lodged in the owner of the waste whereof he is lord, or as the right of fishing belongs to him who is that is the owner of a private or inland river."

"But though the king is the owner of this great waste, and as a consequence of his propriety, hath the primary right of fishing in the sea, and the creeks and arms thereof, yet the common people of *England* have regularly a liberty of fishing in the sea, or creeks or arms thereof, as a public common of piscary; and may not, without injury to their right, be restrained of it, unless in such places, creeks, or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty."

"The next evidence of the king's right and propriety in the sea, and the arms thereof, is his right of propriety to the shore."

"The shore is that ground that is between the ordinary high-water and low-water mark. This doth *prima facie* appear of common right belong to the king, both in the shore of the sea and the shore of the arms of the sea."⁴

What this author here and elsewhere then wrote for his day and generation was, indeed, eminently sound, and to-day the jurists of our country would with as wise a judgment seek to apply the doctrines by him laid down to a like state of things as those to which he applied them, or with reference to which he wrote them, and not to a state of things radically different, we would find no fault.

So far as concerns lands adjoining the sea shore, arms of the sea, and navigable rivers below the ebb and flow of the tide, the common law is, with equal propriety, applied alike

⁴ De Jure Maris, chap. 4.

in this country and in England. The difficulties and hardships which arise are in the application of the rules of the common law to navigable rivers above the ebb and flow of the tide, and to inland lakes and ponds. According to the common law the adjacent owner along rivers not navigable, inland lakes and ponds, owns the bed to the centre thread of the stream.

The application of this rule, it will be seen, becomes of vast importance in this country when we take into consideration the great extent of our navigable rivers above the ebb and flow of the tide, and the still greater number of acres of land covered by shallow waters of lakes or ponds.

By reason of the tendency of our courts to apply the common-law rule in its broadest terms, without discriminating as to any particular class of cases or condition of things, except those named by the common law, we have the almost daily occurrence of applications to the courts and to the government, on the part of adjacent owners whose possessions are perhaps insignificant, and much less than those they seek to recover, to have their titles quieted to large tracts of land lying in the navigable rivers, or which, by cultivation of surrounding soil, become dry in lakes and ponds.

An examination of the authorities will show that it has been the general policy of the courts to comply with such requests. The case of *Middleton v. Pritchard* is a leading one on this subject. This case lays down the common-law doctrine that the title of the riparian proprietor bounded by a navigable stream extends only to high-water mark, and in streams not navigable the rights of the riparian proprietor extends exclusively to the middle thread of the current; that arms of the sea and streams where the tide ebbs and flows are by the common law deemed navigable, and streams above tide water, though navigable in fact, are not deemed navigable in law; and that "all government grants bounded upon a river not navigable entitles the grantee to all islands lying between the main land and the centre thread of the current, for grants by the government are to be construed by the common law unless the government qualify or

exclude the construction ; for when the government makes a grant, and does not reserve any right or interest that could pass by the grant, and shows no intention to make such reservation, the grant must be intended to include all that might pass by it. Grants are to be taken most strongly against the grantee."⁵

According to this decision, therefore, the Mississippi was held not to be a navigable river in law, and riparian owners took title to the middle thread of the stream, including islands, etc. The public, however, had the right of navigation, of landing and fastening their boats, etc. The same doctrine was held in *Morgan v. Reading*.⁶

In a note to Mr. Kent's commentaries these cases were made the subject of high compliment. The learned annotator says : "These decisions in the courts of Illinois and Mississippi are highly credible to their learning and firmness, and it is consoling to meet with such manly support of the binding force of the common law, upon which American jurisprudence essentially rests."

We may state the common-law doctrine, generally, thus :

First. The riparian owner adjoining the sea arms and navigable streams below the ebb and flow owns to high water below this belongs to the crown or government.

Second. The riparian owner above the ebb and flow on navigable streams owns to the centre of the river, subject to public use.

Third. In case the river changes its channel, or alluvions are formed on one side or the other, insensibly or by slow and imperceptible means, the middle of the river remains the boundary.

Fourth. On the other hand, if the change is sudden, perceptible, erratic, the boundary is the former channel or part of the former channel, and parties take the channel or part as the case may be.

Fifth. In the case of islands being formed in rivers above the ebb and flow, they become the property of the adjacent

⁵ 3 Scam. (Ill.) 510.

⁶ 3 Smedes & Marshall, 336.

owner to the middle line of the river. If the formation is below the ebb and flow, or in the sea and navigable lakes, it belongs to the government or crown.

Sixth. In case the conveyance bound the land along the shore of a river not navigable, the grantee takes to the middle.⁷

Seventh. The same rule obtains with reference to navigable lakes as to navigable rivers.⁸

It would require more space than we can devote to this article to notice the many exceptions to these general rules, both in this country and others, growing out of peculiar customs and statutory regulations; as, for instance, in Maine and Massachusetts, by colony ordinance of 1641, and usage arising therefrom, the proprietor of the land adjoining bays and arms of the sea, and on rivers where the tide ebbs and flows, owns to low-water mark, subject to the public easement, to not exceeding one hundred yards below high-water mark.

But it is our only object in this paper to discuss the applicability of the common-law rule to the rivers of this country, independent of any such local laws or usage.

In the case of *Gavit v. Chambers*⁹ the court says: "If it be assumed that the United States retain the fee-simple in the beds of our rivers, who is to preserve them from individual trespass, or determine matters of wrong between the trespassers themselves? It cannot be reasonably doubted that if all the beds of our rivers supposed to be navigable, and treated as such by the United States in selling lands, are to be regarded as unappropriated territory, a door is opened for incalculable mischiefs. Intruders upon the common waste would fall into endless broils amongst themselves, and involve the owners of adjacent lands in controversies innumerable. Stones, soil, gravel, the right to fish, would all be subject to individual scramble, necessarily leading to violence and outrage."

⁷ 3 Kent, 429, *note*.

⁸ See 3 Kent, 429, *note*, and cases cited.

⁹ 3 Ohio, 495.

In South Carolina it was held that where a certain sur-
called "Dean's Swamp" as a boundary, the creek or n-
stream of the swamp was intended, and not the outer e-
or margin of low, marshy land that frequently bounded
main stream.¹⁰

In questions of boundary, it is yet a rule that nat-
objects have a preference over marked lines or corners, o-
line designated by course and distance, and central.¹¹

As to the question of boundaries on rivers, it may
stated that, unless there are explicit words distinctly de-
ing other or narrower limits, the adjacent owner goes to
middle thread of the stream.¹² And to this end, langu-
when doubtful, is strongly construed to so mean.¹³ T-
when the description was the "margin" of a river, the c-
held that the line was the centre of the stream.¹⁴

In *Child v. Starr*¹⁵ it was held that the grantee of a t-
described as running along a shore took to the middl-
the stream, although, strictly speaking, fresh-water stream-
not possess shores.¹⁶

It has even been held that when land was bounded b-
line commencing at a stake "by the side of the river
mill pond," and running "by the side of said pond"
another stake "by the side of said pond," that the gra-
took to the middle of the river;¹⁷ so, a line runn-
between two trees, one "standing by the side of" and
other "by the river;"¹⁸ so, when the line around a t-
described it as commencing and ending at stakes "at

¹⁰ Angell on Water Courses, 22; *Felder v. Bonnett*, 2 McMull. (S. C.)
See, also, *Lord v. Comm. City of Sidney*, 12 Moore P. C. 473.

¹¹ *Hurly v. Morgan*, 1 Dev. & Bat. (N. C.) 425; *Lynch v. Allen*, 4 D-
Bat. 62.

¹² Angell on Watercourses, H, and cases there cited. See, also, Lo-
Comm., 12 Moore P. C. 473.

¹³ *Ibid.*

¹⁴ *Ex parte Jennings*, 6 Cow. 518.

¹⁵ 4 Hill, 369.

¹⁶ 20 Wend. 149.

¹⁷ Angell on Water Courses, 33, and cases there cited.

¹⁸ Angell on Water Courses, 33, and cases there cited.

river."¹⁹ So, when the line was described as "thence along the river to the place of beginning," although the "thence" point was an oak tree half a mile from the river.²⁰

In the case of the *People v. The Canal Appraisers*²¹ the court held that "grants by the legislature of islands in rivers and streams where the tide does not ebb and flow, although made during a long series of years, will not justify the conclusion that the principle of the common law has not been adopted here—that grants of lands upon rivers or streams where the tide does not ebb and flow carry the exclusive rights of the grantees to the middle of the stream; or, having been adopted, that it has ever been legally abrogated or exploded."

We might extend our citation of authorities maintaining this view of the subject to much greater length, but do not deem it necessary or proper, considering the limits of this article. Suffice it to say that by a large preponderance of the authorities is this view of the subject maintained by our courts. On the other hand, however, there are many very able authorities which hold a contrary view. Some of them we will briefly notice.

In the case of the *Railroad Company v. Schurmeir* the court says,²² quoting from Mr. Kent and discussing the subject at some length: "Proprietors bordering on streams not navigable, unless restricted by the terms of the grant, hold to the centre of the stream; but the better opinion is that proprietors of lands bordering on navigable rivers, under titles derived from the United States, hold only to the stream, as the express provision is that all such rivers shall be deemed to be, and remain, public highways. Grants of land bounded on rivers above tide water, says Chancellor Kent, carry the exclusive right and title of the grantee to the centre of the stream unless the terms of the grant

¹⁹ Angell on Water Courses, 33, and cases there cited.

²⁰ Angell on Water Courses, 33, and cases there cited. See further cases illustrating this subject same place, *et seq.*

²¹ 13 Wend. 355.

²² 7 Wall. 287.

clearly denote the intention to stop at the edge or margin of the river, and the public, in cases where the river is navigable for boats and rafts, have an easement therein, or a right of passage, subject to the *jus publicum*, as a public highway.

The views of that commentator are that it would require an express exception in the grant, or some clear and unequivocal declaration, or certain and immemorial usage, to limit the title of the riparian owner to the edge of the river, because, as the commentator insists, the stream, when used in a grant as a boundary, is used as an entirety to the centre of it, and he consequently holds that the fee passes to that extent.

Decided cases of the highest authority affirm that doctrine, and it must doubtless be deemed correct in most all jurisdictions where the rules of the common law prevail as understood in the parent country. Except in one or two states, those rules have been adopted in this country, as applied to rivers not navigable when named in a grant or deed as a boundary to land.

Substantially the same rules are adopted by Congress when applied to streams not navigable, but many acts of Congress have provided that all navigable rivers or streams in the territory of the United States, offered for sale, should be deemed to be, and remain, public highways.²⁴

Irrespective of the acts of Congress, it should be remarked that navigable waters not affected by the ebb and flow of the tide, such as the great lakes and the Mississippi river, were unknown to courts and jurists when the rules of the common law were ordained; and even when the learned commentaries were written, to which reference is made, it was still the settled doctrine of this court that the admiralty has no jurisdiction except where the tide ebbed and flowed.

Extended discussion of that topic, however, is unnecessary, as the court decides to place the decision in this case

²³ 3 Kent, 11th ed. 427.

²⁴ 1 Stat. at Large, 491; 2 *id.* 235, 279, 642, 666, 703, 747; 3 *id.* 349.

²⁵ The *Jefferson*, 10 Wheat. 428; *Genesee Chief*, 12 How. 456; *Hill v. Trevor*, 4 Wall. 565.

upon the several acts of Congress making provision for the survey and sale of the public lands bordering on public navigable rivers, and the legal construction of the patents issued under such official surveys. Such a reservation in the acts of Congress, providing for the survey and sale of such lands, must have the same effect as it would be entitled to receive if it were incorporated into the patent, especially as there is nothing in the field notes, or in the official plat or patent, inconsistent with that explicit reservation. Rivers were not regarded as navigable, in the common-law sense, unless the waters were affected by the ebb and flow of the tide, but it is quite clear that Congress did not employ the words "navigable" and "not navigable" in that sense as usually understood in legal decisions. On the contrary, it is obvious that the words were employed without respect to the ebb and flow of the tide, as they were applied to territory situated far above tide waters and in which there were no bodies of salt water. Viewed in the light of these considerations, the court does not hesitate to decide that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common-law rules of riparian ownership should apply to land bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be, and remain, public highways. Although such riparian proprietors are limited to the stream, still they also have the same right to construct suitable landings and wharves for the convenience of commerce and navigation as is accorded riparian proprietors bordering on navigable waters affected by the ebb and flow of the tide.²⁶

The inapplicability of the common-law doctrine to the condition of things existing in this country became manifest to the courts when the question of admiralty and maritime jurisdiction arose for determination in this country.

In the case of the propeller *Genesee Chief*²⁷ it was held that

²⁶ See *Dutton v. Strong*, 1 Black, 23.

²⁷ 12 How. 443.

the act of Congress of 26th of February, 1845,²⁸ extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same, was consistent with the constitution of the United States—not upon the ground of the power of Congress to regulate commerce, but upon the ground that the lakes and the navigable waters connecting them are within the scope of admiralty jurisdiction, as known and understood at the time of the adoption of the constitution; and that the admiralty and maritime jurisdiction granted to the federal government by the constitution of the United States is not limited to tide waters, but extends to all public navigable lakes and rivers where commerce is carried on between different states or with foreign nations. The chief justice, in delivering the opinion of the court in this case, after referring to the doctrine which limits navigability to the ebb and flow of the tide, uses the following language: “If such be the construction, then a line drawn across the river Mississippi would limit the jurisdiction of the courts of admiralty although there were ports of entry above it, and the waters as deep and navigable, and the commerce as rich and exposed to the same hazards and incidents as the commerce below. The distinction would be purely artificial and arbitrary, as well as unjust, and would make the constitution of the United States subject one part of a river to the jurisdiction of a court of the United States and deny it to another part equally public, and but a few yards distant.”

It would seem that a consideration of this phase of the question would of itself be sufficient to prevent any attempt on the part of the courts to apply the common-law doctrine in this country. It is evident that there is no reason for applying admiralty jurisdiction to public tide waters which does not exist with reference to all other navigable waters used for the purposes of domestic and foreign trade and commerce.

This view of the subject is very forcibly and logically argued and maintained by the commissioner of the general

²⁸ 5 Stat. at Large, 726.

land office in his report for 1868 (pp. 121 to 132, inclusive), wherein he discusses at some length, and with very great ability, the subject of this paper, and very clearly establishes the view sought to be here maintained.²⁹

The report argues the impossibility and absurdity of attempting to establish any artificial line that would in any way meet the demands of justice, or accurately locate the limit of jurisdiction; and suggests, as we have said, that the same reasons prove the absurdity of the common-law distinction, holding the bed of a river simply from the ebb and flow of the tide to be public property, and that above such line not to be, although of the same commercial importance.

It would seem that if anything more than the mere announcement of the proposition were necessary to convince any thoughtful reader of its absurdity, this would be sufficient.

Chief Justice Tilghman, in the case of *Carson v. Blaizer*,³⁰ said, in speaking of the Susquehanna: "If such a river had existed in England, no such doctrine (declaring its bed to be private property, belonging to the owners of its banks) would ever have been applied to it. Their streams in which the tide does not ebb and flow are small." In this case the court denies with much force of argument the common-law doctrine.

The principal rivers of England and Wales are the Severn, Mersey, Thames, Humber, Trent, and Ouse, having a no greater united length than eight hundred miles, and only a navigable length, with the aid of modern improvements, with steam, of four hundred miles. But, at the time when the common law on this subject had its origin, steam vessels were unknown. Sail vessels not being able to make head against

²⁹ The reader interested in the investigation of this subject will find it to his interest to consult this report. The following cases are referred to in this report: *Case of Thomas Jefferson*, 10 Wheat. 428; *Peroux v. Havard*, 7 Pet. 324; *Steamboat Orleans v. Phœbus*, 11 Pet. 175; *Waring et al. v. Clerk*, 5 How. 441; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344; *Hine v. Trevor*, 4 Wall. 555.

³⁰ 2 Binn. 477; *Ingraham v. Wilkinson*, 4 Pick. 272.

the currents of the short rapid streams, the limit of navigation was fixed at the limit of the ebb and flow of the tide. It is only necessary to compare this state of things with that which exists in this country to see the inadequacy of the rule then adopted to meet the wants of our people. The Mississippi and its seventy-six affluents, including the Red river, Missouri, and Ohio, drain a region of one million two hundred thousand square miles, passing from north to south through a region of eighteen degrees of latitude, producing every species of produce from the hardest cereal to tropical fruits, and capable of sustaining almost untold millions of population, and possessing a steamboat navigation of sixteen thousand six hundred and ninety-four miles, and carrying over fifteen hundred steam vessels, with an aggregate burden of more than twice the entire steam tonnage of the British commercial marine. By nature, in the councils of a wise Providence, these great highways were made for the common good, and means of intercommunication between the millions existing on the soil along and at the extremes of the vast area of country traversed by them. As much as the oceans, they should be free and common to all. To give their beds to the inhabitants along their banks, and deprive them of maritime jurisdiction, would be to do what was never contemplated in the making of any law. Before the adoption of the constitution the Congress of the United States, in the fourth article of the ordinance, dated July 14, 1787, for the government of the territory northwest of the Ohio, declared that "the navigable waters leading to the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways forever free, as well to the inhabitants of said territory as to the citizens of the United States, and those of any other state that may be admitted." Afterwards, in dealing with the proprietary rights, the fifteenth section of the act of Congress of June 4, 1812, declares that the Mississippi and Missouri rivers, and the navigable waters flowing into them, shall be common highways, and forever free to the citizens of the

³¹ Report Com. Gen. Land Office, 1867, 103.

United States. To place these two great rivers and the Ohio, with an aggregate navigable distance of over six thousand miles, containing in their channels large tracts of land, on a level before the law with the Thames and Mersey, is absurd.

Chancellor Walworth, in the case of the Canal Commissioners v. The People, *supra*, said :

“It is, therefore, preposterous to contend that the limited doctrines of the common law are applicable to the Mississippi, Ohio, Susquehanna, Niagara, and St. Lawrence. If applicable, Grand Island in the Niagara, with eighteen thousand acres, would belong to the owners of the shore.”

In a comparatively recent case in New York (The People v. Canal Appraisers, 33 N. Y. 461) the court rendered a very able opinion, holding that the large rivers of the United States, above tide water, correspond to navigable tide-water rivers of England, having ports of entry, and being carrying place of foreign and domestic trade; and that there is the same reason for holding their beds to be public property; and that their commercial character should rather be determined upon these considerations than the unimportant fact of their being less remote from the sea.

Mr. Justice Bronson, in his dissenting opinion in the case of Starr v. Child,³ uses the following language :

“Navigable rivers belong to the public. Other streams may be owned by individuals. This doctrine is founded on principles of public policy so obviously just and wise that it is no matter of astonishment to find it prevailing all over Europe, and, so far as I know, all over the civilized world. Indeed, it would be strange if any enlightened people had failed to perceive the importance of declaring all navigable waters public property.

“In England a rule of evidence has been adopted which, though it recognizes the doctrine, does not always give it complete practical effect. By the common law the flow and reflow of the tide is the criterion for determining what rivers are public. This rule is open to the double objection that it

³ 20 Wend. 158, *supra*.

includes some streams which are not, in fact, navigable, and which, consequently, might well be the subject of individual ownership, and it includes other streams which are, in fact, navigable, and which, in every well-regulated state, should belong to the public.

“Although the ebb and flow of the tide furnishes an imperfect standard for determining what rivers are navigable, nevertheless approximates the truth, and may answer very well in the Island of Great Britain, for which the rule was made. But such a standard is quite wide of the mark when applied to the great fresh-water rivers of this continent, and would never have been thought of here if we had not found the rule ready made to our hands. Now, I think no doctrine better settled than that such portions of the law of England as are not adapted to our condition form no part of the law of this state.

“This exception includes not only such laws as are inconsistent with the spirit of our institutions, but such as were framed with special reference to the physical condition of a country differing widely from our own.

“It is contrary to the spirit of the common law itself to apply a rule, founded on a particular reason, to a case where the reason utterly fails. *Cessante ratione legis, cessat ipsa lex.* * * *

“If it were either necessary or proper for me to vindicate the judgments of the courts of last resort, it could, I think, be most satisfactorily established that it is now, and always has been, the law of this state that *navigable rivers*, whether fresh or salt, and without any reference to the flow or reflux of the tide, belong to the public. But it is enough that the question has been settled by a forum from which there is no appeal.”

And this is the conclusion arrived at by Mr. Justice Bronson after a careful review of the cases decided in the state, and will be seen by reference to the case as reported. The learned judge reviews the whole question at considerable length, and with so able argument against the application of the common-law rule that it would seem to be convincing

Again, the commissioner of the general land office, in his report for the year 1868, argues with much ability against the application of the doctrine, *usque ad filum aquæ*. Perhaps I cannot do better than to quote his own language.³³ He says :

“Conveyances made in this country by patentees and their grantees of lands on the margins of rivers whose beds have been surveyed and patented, present the same opportunities for the application of the maxim as conveyances in England, or to older states of the Union. But such conveyances are altogether different in several essential particulars from that of United States patents for lands bordering on meandered and unsurveyed streams.

“In such cases it cannot be presumed that it was the intention to convey to the middle of the river, for the sale was regulated by law, which provides only for the disposal of lands previously surveyed and platted, no authority existing to embrace unsurveyed lands in the patent. * * *

“The beds of meandered rivers and lakes are not surveyed, and the power of agents executing sales of adjacent lands to convey purchases to the middle of the stream is clearly wanting.”

The commissioner denies that the right follows as an incident, and illustrates by showing that if such a principle did exist, it would apply as well to the banks of the Ohio and Chattahoochee—of the former of which the Supreme Court has decided that deeds of land on the north bank carry the grantee only to low-water mark; and of the latter, that grants of land in Alabama, on its banks, carry the grantee only to the banks of the stream.³⁴

Among numerous authorities he cites that of *Child v. Starr*, and quotes the language there used as follows :³⁵

“The bed of a river is a substantial matter of grant, and can pass only as such. It can never pass as incident or

³³ Report Com. Land Office, 1868, 126.

³⁴ *Hendy's Lessees v. Anthony*, 5 Wheat. 374; *Howard v. Ingersoll*, 13 How. U. S. 381.

³⁵ 4 Hill, 482, *supra*.

appurtenant to a grant. It is land, and land cannot be incident or appurtenant to land. The conveyance of one acre of land can never be made, by any legal construction, to another acre by incident or appurtenant to the first. The land, and that only, which is expressly embraced in, forms the subject-matter of, a grant passes under it."

In this connection the commissioner remarks that "lands bordering on meandered rivers are frequently entered by actual settlers under the preëmption and homestead laws, which the maximum quantity taken by any one person is limited to one hundred and sixty acres." "Will it be contended," he asks, "that such claimants, after having entered and selected and entered on the river bank the full quantity allowed by law, and applied for and obtained a patent for the same, are entitled by some undefined process to, perhaps, an additional one hundred and sixty acres of ungranted land in the bed of the river, in defiance of statutory limitations?"

An examination of the conduct of the general land office will show that it has been the settled policy not to recognize the common-law rule as applicable to the public lands lying along our great navigable rivers, and adjoining inland lakes and ponds.

Many years after the public survey and running of meandered lines, large tracts which have been uncovered by receding of the waters, or change of channel, or for other or all causes, have been surveyed and sold. Why this policy should not be adhered to, and the decisions of the courts conform to it, is a little difficult to see.

In this day and age, when every man's possessions are capable of easy and exact ascertainment, we see no reason why in dealing with the public domain, as in all the transactions of life, the purchaser should not be confined to what he purchases and pays for. There is neither right, justice, sound policy, nor wise management, in any other course.

The doctrine of alluvions has some foundation in the necessity of things. It is impracticable to measure or account continually for the small and almost imperceptible growth

which are made along the margins of rivers. But, in our opinion, this doctrine should be restricted to its narrowest limits, only allowing the gain to the adjacent owner when a jury should find it impracticable to measure the increase. There is no basis for the idea that, because a man buys land upon the margin of a river, and is subjected to the loss of soil by the washing of the waters, that therefore he should be entitled to the increase of a reverse action of the waters. Every man who buys land is supposed to do so in contemplation of all the natural advantages or disadvantages to which it may be subject. If he buys a swamp, he may expect malarial fevers. If he buys along the margin of a river, he may expect that his land will be washed away. In one case, no more than in the other, should he expect or be entitled to compensation.

Especially does the application of the common-law rule lead to an absurdity and injustice when applied to the numerous meandered lakes and ponds which so abound in this country.

Continually are contests arising before the general land office between purchasers of the after-surveyed bottoms of these meandered lakes and ponds, and the riparian owner—the latter often claiming tracts of land quite as large as his original purchase.

It is with some pleasure that we think that we notice a tendency in the courts, latterly, to recognize the common-sense rule contended for, and to ignore the inapplicable, ancient fiction, which has its basis in the assertion that that is true in law which is not true in fact, and which has its only argument in ancient precedent, which, though right enough in its day, is wrong for the present day or state of things existing in this country.

This common-law doctrine has been denied by courts in New York, Pennsylvania, South Carolina, Alabama, Iowa, Virginia, Tennessee, North Carolina, and Michigan; not uniformly in all of these states, but, as a rule, in most of them, and uniformly in some. We have discussed this subject only with reference to the common law.

It would be a pleasant, though somewhat laborious, task to point out the various laws upon the subject, emanating from different parts of the world.

We can only note that by the civil law all rivers, properly so called, even above tide water, provided they are navigable by ships or boats, or, as it would seem, by any other floating vehicle, are considered public property.

The same is true of the French law, as appears from the Code Napoleon (liv. 2, tit. 1, c. 3, art. 538), in which are enumerated, among other subjects of public domain, *fleuves et rivières navigables ou flottables*, "which last words seem to have been coined," as remarked by Chief Justice Parker in *Ingraham v. Wilkinson* (*supra*), "to comprehend all streams on which boats, rafts, lumber, or any other species of property, may be transported. It is probable," he further remarks, "that this distinction arose from the difference in magnitude between the rivers on the continent and those on the island, many of the former being navigable much beyond the ebbing and flowing of the sea, and few, if any, the latter being of consequence for passage or transportation above the tide."

P. N. BOWMAN.

WASHINGTON, D. C.

VIII. BOOK REVIEWS.

STORY'S COMMENTARIES ON EQUITY JURISPRUDENCE. Twelfth Edition. By J. W. PERRY. Boston: Little, Brown, and Company. 1877.

The twelfth edition of Judge Story's Commentaries on Equity Jurisprudence comes before us in the handsomest type of Little, Brown, and Company, and under the editorial revision of Jairus V. Perry, who has himself stepped into the front rank of commentators by his Treatise on Trusts. It is a combination of excellencies. The work itself is, indeed, "a wonderful exposition of the Jurisprudence of Equity" and "an enduring monument to the industry, learning, and genius of its distinguished author;" the notes and addition of cases of the present editor are marked by his pointed felicity and exhaustive accuracy; and the publisher's part of the common enterprise is such as to delight the eye of the genuine lover of books. Under these circumstances the usual notice of a new edition of an old favorite is scarcely necessary, specially as it can be little else than an unmeaning eulogy. A reviewer is nothing unless he can pick flaws enough to make his article spicy, or claim credit for knowing more than author or editor.

In these days of rapid reporting, and, we may add in a double sense, rapid digesting, the young law student may stand somewhat aghast at the making of books, of which there is no end. Within six or seven years that marvel of workers, Benjamin Vaughan Abbott, has prepared, and Messrs. Little, Brown, and Company have published, twenty ponderous volumes of digest, fourteen of them giving the *apices juris* of nineteen hundred volumes of reports up to the first of January, 1870, and the other six embodying similar points of five hundred and seventeen volumes of reports, the accretions of the subsequent six years. And this is only the beginning, not of the end by a long ways (lawyers not having much faith in a speedy millenium), but of a new crop. The progeny of the last quarter of the nineteenth century promises to be more numerous than that of the ages which have preceded. Even now the diligent young lawyer may find at least

one "case in point" on any side of any question, and can enter into the forensic struggle "armed and equipped according to law," that is, with a precedent. What future generations may do to a new Justinian "sweeps the platter clean," we need not trouble our heads about. "Sufficient unto the day is the evil thereof."

In truth, however, it needs no prophet to foresee that the law, if it be an evil, will work its own cure. Necessity will lead to the fusing of large masses of decisions, either by common consent of the courts or by the unsparing hand of the law maker, into a few general principles, and irreconcilable conflicts will be closed by positive edicts, *sic lex scripta est*. There is a tendency in our law books to condense the wealth of material into books that can be easily handled—what Lord St. Leonards called handy-books. No one need speak of Stephen's Digest of the Law of Evidence, Dunbar's Abridgment, and Judges Dillon and Cooley's masterly condensations of certain important heads of the law, the repertoires of High, Chicago, and Freeman, of Sacramento, give us much law in a convenient compass. All such books are better than digests, for the materials have been passed through the alembic of clear and active minds, and reduced to cohesive symmetry, while the references enable the judicious reader to judge for himself as to the correctness of the analysis. The field of equity jurisprudence has also experienced the same tendency. Adams's Doctrine of Equity was a successful effort to condense the principles of law as administered in the Court of Chancery, and of the proceedings by which these principles are enforced, somewhat marred in the later American editions by an incongruous mass of notes by the various editors. Bispham's Principles of Equity is worthy of a place on the same shelf.

The very multiplicity of precedents tends to diminish their relative value, as the inflation of the currency lessens its purchasing capacity. The person who is forced to take them will make a selection, and those which have intrinsic value will be preferred to those which pass current merely because they are issued by authority. It is the ring of the metal which governs in both cases. The test of merit in a decision lies in the clearness with which the principle is enunciated, and the logical accuracy with which the *ratio decidendi* is explained and applied. This test is met, not as in the civil law—by abstract reasoning from supposed axiomatic premises—but by the application of the reasoning powers to the preëxisting law. "Though proceedings in equity," says Sir Joseph Jekyll in his

nous opinion in *Cowper v. Cowper*, 2 P. Wms. 720, "are said to be *undum discretionem boni viri*, yet when it is asked, *vir bonus est is?* the answer is, *qui consulta patrum, qui leges juraque servat.*" The discretion of the equity judge is not arbitrary, but according to settled law. What is required, then, is not reason alone; it is reason guided by the great lights, the leading precedents of the past. The judge must know the origin of the principle he is called on to apply, and the history of its subsequent evolution. It is precisely for this reason that the commentaries of Judge Story on Equity Jurisprudence are, at present, invaluable. The general plan of the work, while not so scientifically accurate as that of Mr. Pence, is far better adapted for practical purposes. The natural order in which each branch of the subject is taken up and discussed could not well be improved upon. Its great merit, however, is that it goes back to the fountain-head of modern equity law, and traces the stream for us to the date of its last publication by the author himself. The later editorial additions to the text, and the addition of new cases to the notes, while they enhance the value of the work as a practical manual, detract to a certain extent from its original faultless symmetry. We are not surprised to find, as the editor tells us in his preface, that many lawyers have expressed a desire that the original text of the author should be restored and preserved. And we are glad to find that the inclination of the editor was in the same direction, and that he did actually, as he boldly puts it, conclude "to modify some of the peculiarities of style" of his immediate editorial predecessor.

Equity law, as administered in America, commences with Lord Nottingham in 1673, two hundred years ago. The strong practical sense of this great judge enabled him to throw off what Mr. Pence has called the obsolete jurisdiction of the court of chancery, and to limit it within what is designated as the extraordinary jurisdiction of the court, while a current of humor, both genial and caustic, enlivens his opinions and fills them with pithy and pointed sentences. It is this characteristic that makes his decisions, brief and badly reported as they are, so readable. His immediate successors, among whom were Lord Somers and Lord Talbot, were not long enough on the bench to make any profound impression on the course of the court. This was left for Lord Hardwicke during his twenty years of continuous service, from 1736 to 1756, a period which enabled him both to deepen and widen the foundation of the "father of equity law," and to contribute largely to the erec-

tion of the superstructure. "His numerous decisions," says the author, § 52, "evinced the most thorough learning, the most exact skill, and the most elegant judicial analysis." Even Mr. Hallam, whose History of the Court of Chancery is a long tirade of abuse against the court and of scandal on the occupants of the wool-sack, admits that the judicial character of Lord Hardwicke was almost universally praised by the profession, and adds: "It is indisputable that his judgments were *secundem artem*, well founded, and good precedents for future determinations." A quarter of a century after his death the bold, aggressive, and incisive mind of Lord Thurlow made, in twenty years, a deep and lasting impression on the jurisprudence of the court. Lord Eldon's subsequent long career, notwithstanding the conservative bent of his genius, and perhaps for that very reason, tended to settle the principles and practice of the court on its ancient foundations, but with modern improvements, in which he was largely assisted by his great Master of the Rolls, Sir William Grant. After him the omnipotent British Parliament began its innovations, slowly at first, since more rapidly, which have since in so overwhelming the old land-marks that ere long only a poor two above the flood may be left to tell of the antediluvian world.

With the equity decisions from Lord Nottingham to Lord Mansfield inclusive, the familiarity of Judge Story was simply marvellous. It is in this respect that his labors cannot be replaced. He has given us, in almost every instance, the leading case on the subject of the discussion, with the subsequent decisions in affirmance, qualification, or reversal. He enables us to see for ourselves how the master minds grappled an unsolved difficulty, and brought it out of chaos. He puts before us the *ratio decidendi* in its original simplicity, and traces it through its protean forms or applications. No mere condensation of the principles of equity, with the authorities cited in support, can supply the place of this scheme. For the student, this broad pathway of knowledge for the teacher. To him who wishes to know, not only what the equity law is on a given subject, but why it is, and how it is, the work is a *sine qua non*. It may use a few more words than, in these days of telegrams, may be absolutely necessary. It may be slower in reaching a conclusion than suits the Macbethian motto, "be it thought and done." It is sometimes disappointing in not stating any conclusion which is very unsatisfactory to those who like an author to do it for them—a large class even in the legal profession. With all its faults, we shall not soon see its like again.

The additions made to the text of Judge Story suggest a remark which he himself, who, it has been well said, "sucked up jurisdiction like a sponge," would be the first to acknowledge the truth of, and that is, that equity is, even more than any other branch of the law, progressive. Its original jurisdiction was rather legal than equitable, its present jurisdiction being then literally extraordinary. The extraordinary, as in the Roman system, gradually encroached upon the ordinary, and the present tendency, where the legal and equitable jurisdictions are not blended, is to turn legal cases over to equity rather than the reverse. Under the ecclesiastical chancellors, as we learn from the calendars of proceedings in chancery, bills were filed to recover for the breach of a contract to deliver personal property, for breach of marriage promise, and for protection against the practice of witchcraft. It looks like we might go back to first principles, and a modern table-turner might find himself enjoined from practising his mystic arts by that most potent of weapons—a chancery injunction. If so, the court will be compelled to resort to Archbishop Morton's celebrated decision, as chancellor of Henry VII., and declare that a dealer in such high art "*sera damne in hell.*" Year Book, 4 Hen. VII. fo. 5. The modern chancellor in equity leaves such judgments to his ecclesiastical brother.

Besides the tendency to enlarge the jurisdiction of equity by giving it cognizance of legal matters, there can be no doubt that there is a like tendency to extend in some direction the bounds of admitted jurisdiction. This is very obvious in two or three particular directions, such as specific performance, equitable estoppel, and the powers of the court through its injunctive process and its receivers. The notes of recent cases to the work under consideration will repay examination on these points, and keep the reader up with the current. We do not find, however, any notice of the late decisions cited in *Meyer v. Johnston*, 4 Cent. L. J. 111, where the Supreme Court of Alabama undertake to say that the receiver of a railroad may be authorized, by the court which appoints him, to issue negotiable certificates of indebtedness, which shall be a first lien on the property, when this course is necessary to raise money for the management and preservation of property until it shall have been disposed of. It seems that other courts have gone further, and authorized the issuance of such securities, to the amount of hundreds of thousands of dollars, to complete an unfinished railroad in the hands of its receiver, and to equip it for running, and to make

the debt thus created a valid and prior lien on the property against preëxisting lien creditors and the owners. The court, in other words, undertake, not merely to adjudge the case brought before it, and to protect the property pending the litigation, but to determine that it is for the interest of the parties that the property should be improved, *volens volens*, and charge it, at the expense of the litigants, accordingly. The rights of the owner and of a person who acquires a title to the property by contract are, at the will of the judge, transferred ("convey the wisdom of the law" call") to a third person. No English court, it may be safe to say, has ever done anything of the kind. It requires a free government and a free court to accomplish such a feat. Of course, we look in vain for anything on this subject in Judge Story's original treatise, nor do we find upon an examination of the notes that the present editor has got so far in his studies. We must wait, with whatever appetite we may, for the next edition. W. F. C.

HARSTON'S CALIFORNIA CODE. Practice, Pleadings, and Evidence in the Courts of the State of California in General Suits and Proceedings: Being the Code of Civil Procedure of California as amended up to the Close of the Twenty-first Session of the Legislature (1876), with full Cross-references and Annotations from the Reports of the Various Courts in the United States. By E. F. BUTTERMER HARSTON, of the San Francisco Bar. San Francisco: A. L. Bancroft & Co.

The California Code of Procedure covers practice, the statutory limitations, special proceedings, evidence, etc., as well as pleadings and consists now of 2104 sections. The legislature, in 1864, published this code in two volumes, with full notes, and the work before us embraces the whole in one large volume, with notes, covering more space than those of the official edition, but still they contain a more complete digest of the California decisions. The form in which the book is got up is a very convenient one for practical use. Immediately after each section there follows in double column a digest of all the California cases that bear upon the subject-matter of the section, and with numerous cross-references. The subject of each decision referred to, as well as the cross-references, are indicated by catch-words in black letter, often arranged alphabetically, which is a great help to one who is in a hurry, as who is not. The work seems to be one of the best of the kind. It is not a commentary or a treatise; no principle is discussed; the author

conclusions are not given in case of conflicting decisions or otherwise, but it is an intelligent and painstaking digest, somewhat after the manner of Voorhees' New York Code and Seney's Ohio Code, although the opinions of the court upon the given question seem to be more fully and carefully stated than in either. The work would seem to be indispensable to a California practitioner, and useful to those in other states practising under the same system.

Works of this kind which abound in the several states should not be confounded with commentaries. They are simply aids in finding the law upon the subject as judicially declared. Those who are mere practitioners, who look at every question through the authorities, and at nothing through the reasoning faculties, who can see no philosophy in the code procedure, or indeed in any other, but are only anxious to keep within lines as marked by those in authority, have no use for treatises that discuss principles, and gauge the authorities by them. They want decisions, and works like Mr. Pomeroy's are only appreciated as they point to decisions. There are others who, of course, must have the decisions, but they want something more. An author who brings genius and labor to the discussion of a subject, who has the patience to seek, and the ability to discern, the principle that should control the decisions upon a given question, who can reconcile such of the cases with themselves, and with the principle so found, as are worthy to be regarded as authority, and expose the errors of others, becomes himself an authority. Authors of this class meet the wants of such students, and their works must of necessity gradually take the place of reports. Indeed, the latter are becoming so numerous as, for that reason alone, to be beyond the reach of most lawyers. The works of such writers as Washburn, Bishop, and others of the later school, as well as those of Blackstone and Kent, will come to take the rank in countries where the common law prevails, now given to those of the Pothiers and Savignys upon the continent, although we shall never lose that traditional reverence for decisions which is unknown in countries where the civil law prevails. While the book of Mr. Harston does not rise to the dignity of a philosophical commentary, or a commentary at all, it is all that it professes to be, and is one of the best works of its kind. What renders it more valuable than a mere digest is the fact that the author is not content with copying the syllabi of the cases cited, but gives fuller and more satisfactory statements of the views of the court than are indicated by ordi-

nary head-notes, and also the fact that the opinion of the court is given in direct connection with the text of the statute, thus rendering it unnecessary in most cases to refer to any other book.

That part of the code pertaining to pleading, with its connection with the trial, is the only part which is of special interest outside California. It is copied, with some changes, from the code of New York, and in its leading provisions is the same as found in the so-called code states. Unlike the New York and other codes, that of California says nothing in terms about equitable actions or actions heretofore called equitable, either in abolishing the distinction of action, or in providing for the union of different causes of action in one complaint; nor does it speak of equitable defence or counter-claims. But its general language is held to imply that in this regard, all that is elsewhere expressly stated. So that in California, as in most of the other code states, there is no such distinction as a legal and equitable action as distinguished from each other, but all applications to the court, in the form of an action, for the prevention or redress of wrongs, are simply civil actions, and special defences, of whatever nature, are simply defences on a particular matter.

The California code has a few provisions not found in the code of New York, which challenge respectful consideration. At common law, tenants in common of real property could not unite in an action to protect their title, inasmuch as it was several, and it has not been supposed that the union was permitted by the code provisions. The opinion that "all persons having an interest in the subject of the action, and obtaining the relief demanded, may be joined as plaintiffs." But section 384 of the California code provides that "all persons holding as tenants in common, joint tenants, or coparceners, or any number less than all, may jointly or severally commence and defend any civil action or proceeding for the enforcement or protection of the rights of such party." This is very broad, and as far as parties to action are concerned, would seem to make co-interests both joint and several; but the legislature, in 1872, adopted a more specific provision in regard to actions pertaining to the realty, which is embodied in the code of civil procedure as section 381. It provides that "any two or more persons owning an estate or interest in lands under a common source or title, whether holding as tenants in common, joint tenants, coparceners, or in severalty, may unite in an action against any person claiming an adverse estate or interest therein, for the purpose of determining the rights of the parties."

such adverse claim, or of establishing such common source of title, or of declaring the same to be held in trust, or of removing a cloud upon the same." The union here specifically provided for is certainly warranted by sound principle, and the provision is only a little stretch of our old rule of equity pleadings which is embodied in all the codes, and which allows persons to be joined as plaintiffs who have an interest in the subject of the action and in the relief demanded. Another section (§88) authorizes an action against persons associated in business under a common name by such common name, the summons to be served upon one or more of the associates, and provides that the judgment shall bind their joint property. Some of the states, as Ohio, have gone further, and have authorized partners and associates in business to sue and be sued in their associate name, while in most the common law rule still prevails.

The code of California has enlarged the scope of a demurrer by adding a seventh ground, to wit: "That the complaint is ambiguous, unintelligible, or uncertain," which defects are elsewhere reached by motion. It also authorizes the statute of limitations to be pleaded by reference to the statute—that is, "it may be stated generally that the cause of action is barred by the provisions of section — (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure." This mode of avowing a conclusion of law is in harmony with several other provisions found in all the codes, which permit, for the sake of brevity, a private statute to be pleaded by reference; and the performance of conditions precedent to be stated generally, that the party duly performed all the conditions on his part; and, in pleading a judgment or determination of an inferior court, or of an officer or board, that it may be stated to have been *duly* given or made. All these are innovations in that the statement of the facts is not required, but conclusions of law are made to suffice, and yet their convenience sufficiently atones for the departures from principle. The California code, especially by the amendments of 1874, makes a few other changes, among which is a provision for a cross-complaint, although it does not clearly appear how such cross-complaint differs from the first class of counter-claims.

In all the code states, so-called, except three or four, the leading and essential features of the New York code have been preserved, while in most of them a disposition is shown to tinker, and

sometimes without improvement. Legislative committees are to feel called upon to make some change, if but to show superior understanding and fidelity. Hence some changes for better; others well enough if generally adopted, but which are not a real improvement; and others which only mar the system. The Ohio commission made changes, most of them of little practical importance. For instance, instead of adopting the two classes of counter-claims as provided for in the New York code, a distinction is made between a counter-claim and a set-off, when, if the counter-claim is to be used at all, it may as reasonably cover the demand which a defendant may have against the plaintiff by way of set-off as by way of recoupment. In the revision of 1853, Missouri several sections are added to the rules of pleading, which are not found in the original code or in that of any other state. Thus, the old practice act had contained a section making duplicity a substantial objection to a pleading, which had been inserted in order that the vice might be reached by general demurrer. The revisors of 1855, not seeing that the section in the new code would be incongruous and unnecessary, inserted it in these awkward words: "Duplicity is a substantial objection to the petition or other pleading, and shall, on motion, be stricken out." The preceding section had already provided for striking out redundant matter, and nothing more was necessary. Other illustrations may be given from the codes of these two states, both of which followed the example of New York, as well as from those of other states which illustrate a truth which sometimes seems hid from ambitious legislators, to wit: that change is not necessarily improvement. It would be much better—and I am speaking of pleadings and practice—for each state which adopts the reformed procedure to follow closely the great state which first introduced the system. The advantages of so doing are many. We thus may avail ourselves of the construction put upon its provisions by the courts of that state; we are enabled to use its text-books and forms of decisions, also, in other states where the same policy has been adopted, as well as their text-books, will come to our aid, and in a short time, out of the brief and comprehensive rules of pleading thus followed, will grow a system more harmonious, better understood, and far more rational, than the common-law system ever claimed to be.

A TREATISE ON TRIAL BY JURY. Including Questions of Law and Fact, with an introductory chapter on the Origin and History of Jury Trial. By JOHN PROFFATT, LL.B., author of "Curiosities and Law of Wills," etc. San Francisco: Sumner Whitney & Co. New York: Hurd & Houghton. Cambridge: The Riverside Press. 1877.

In the year 1737, upon the evidence we have, Alexander Pope remarked, as a fact to be noted:

"An *author*! 'Tis a valuable name;
How few deserve it! and what numbers claim."

Perhaps the word *author* does not imply any more in the year 1877 than it did in the year 1737. Perhaps, also, the truth in 1737 did not justify the somewhat passionate exclamation of Pope. He was himself an author, and the remark had reference to other authors whose works did not please him. But they were authors—of something—such as it was, and, therefore, the case was unlike that of the countryman who, some years later, called at the office of Mr. Mason to enquire for Mr. Cushman. "Is there a lawyer in this building by the name of Cushman?" said the countryman. "No," said Mr. Mason. "I was told," continued the countryman, "that Mr. Cushman had an office in this building. Was I misinformed?" "That was not what you asked me," said Mr. Mason. "There is a man of the name of Cushman who has an office in this building, but he is no lawyer." A stupid man writes a stupid book. There is nothing venerable in the book, or in the man, but he is, nevertheless the author of the book—such as it is. He made it; it exists; and it had no other maker. The truth is, being an author does not necessarily imply an author of something good. If, indeed, it were otherwise, there would be no mischief-makers, and no devilry generally. Yet it is true that there is a great deal more expected and required of well-meaning authors in this year 1877 than was expected or required even in the early part of this century. There is more to be done, and the requirement is to do it better. And writers of books, and especially of books that treat of some science, are required to conform to this new state of things. Especially is this true of writers of law-books. Except, perhaps, professional teachers, there is no class of men so dependent on books as lawyers in full practice. The constant demand is for authority. What has been decided? The smallest case is seldom argued without the aid of books. Let one address

himself simply to the reason of the magistrate, and, except in the case of the commonest practice, or where the law is quite obvious at first view, the chance is he will be asked, Have you any authority?—that is, some authority extrinsic the magistrate's reason. He does not, at the moment, see it in that—commonly, we believe, because he does not look to find it there. And the reason why he does not look to find it there is, that to do so requires effort, and effort is painful. He prefers that you call a witness; relying, expecting which, the prudent counsel has his witness though usually more than one, sometimes many—mostly dead ones, the longer dead the better—men who, in their life-times, took pains to think. And when these voices on both sides have been heard, the magistrate decides the case, or, perhaps, adjourns to another day to allow you to call yet other witnesses.

Let us not be misunderstood. We do not suggest that precedents are not of value. Undoubtedly they are, in many cases, of as much value as helps to a just judgment. They furnish grounds, ready helps to discover the why and the wherefore, not always immediately obvious. What we suggest is, with a clearer insight into a little more pains they would be less frequently required. We simply recognize the fact that we see every day—that in proportion as one is feeble and lacks self-confidence, his stick is of importance to him. Some do not need one. "I see that is right," said the almost blind Judge Sprague, many years ago, "and if there be no precedent I may as well make one as another."

This labor of looking up authorities is laid on all lawyers. Every wise author of books understands this and works accordingly. Every book that lightens that labor does good service. Then, too, a lawyer must know a great deal about many things. If, for instance, he is going to try a case relating to ship-building or ship-repairing, he must know something about the construction of a ship; the more, of course, the better; if a case of collision of vessels, something about the management of vessels—the more, again, the better; if a case of malpractice by a surgeon, or a physician, something about human anatomy, physiology, and pathology; if a case of breach of warranty of a horse in respect of soundness, something of the structure of the horse, and the functions of his organs and the nature of the diseases to which he is liable. Similarly also in respect of contracts for building houses and other structures. He must be architect or mechanic; he must know the customs and usages of trade; he must be merchant and manufacturer; he must be principal

agent; he must be master and servant. We need not pursue the enumeration. The lawyer's way lies in the science of all sciences—skill and acquaintance! Only he succeeds in the long run who understands what he is doing. And books are useful that help to such understanding. Nor is the choice of books difficult. Mr. Emerson, in his lecture on books, offers three rules: 1, never read a book that is not a year old; 2, never read any but famed books; 3, never read any but what you like. And these he calls "practical rules." In truth they are practical nonsense. Mr. Emerson also tells us, what we have no doubt is true, that the number of printed books in the Imperial Library at Paris exceeds a million. And by counting, as one may easily do, the number of pages which a diligent man can read in a day, and the number of years which human life in favorable circumstances allows to reading, it is plain that though one should read from dawn to dark, for sixty years, he must die in the first alcoves. What, then, does Mr. Emerson propose to do? This, namely: read by proxy; only, he says, we must have good proxies; and they must report "as under oath!" Let the reader just imagine a practising lawyer sending one of his students into a law library to look up the authorities, and on his return to the office making him swear to—something; whether that he has really found the cases he says he has found, where he says he has found them, decided as he reports they were decided, or whether they are good as authorities, we do not know. And imagine the look of a sensible student so engaged in such a proceeding. The difficulty of lawyers does not lie in the choice of books, but in providing the means to pay for them. An examination of a book for five minutes will satisfy a lawyer whether a book will be useful to him. Our business for the present moment, however, is with Mr. Proffatt's book, and our review must be brief.

We have not the pleasure of an acquaintance with Mr. Proffatt, but we have read his book, and we hasten to say we like it. In his brief but intelligible preface he says, it "is an attempt to give the law applicable to all proceedings connected with the jury from its selection to its discharge,"—a laborious task, indeed, but which, nevertheless, as it seems to us, Mr. Proffatt has satisfactorily performed. The book indicates great industry. It indicates also thoughtfulness and sincerity. It is not a mere collection of paper leaves, on which has been printed what from time to time others have said, now stitched together and bound up, and so, properly enough, called a volume; but it is a genuine book, and will well

repay the reading, and entitle the writer to the thanks and goodwill of all who shall read it. It is practicable for lawyers, judges to read it; and they can better afford to buy it and read than to keep the money it costs and play whist, or other such game, and remain ignorant of the many good things it contains. Not only lawyers and judges, but municipal officers and others will find it quite convenient for reference, and in several ways useful. To persons called to serve as jurors it will be especially useful; and to the general reader, who has no immediate concern with the courts, it will be found interesting; nay, to lovers of literature we may safely say, some parts of it will be found attractive. The counsel much engaged in the trial of jury causes the sixth chapter will be found to be especially interesting. The right to open, the advantage of the right; the duty of counsel in opening; the reply; the examination of witnesses; demeanor toward a witness; the cross-examination; questions on irrelevant matters; refusal to answer on the ground of privilege; privilege of argument; counsel; comments on persons and their acts; reading authorities in argument; argument on the law, and responsibility of counsel in argument—in all these, and in other respects, valuable suggestions, admirably set forth, will be found, which will always interest and sometimes amuse, and cannot fail to benefit those who read and reflect. The seventh chapter, which treats of questions of law and of fact, the necessity of distinguishing each, the classification of each, the cause of confusion and mistake in respect of them, and other cognate matters, is likewise interesting and important. So, too, the eighth chapter, relating to the province and duties of the court, contains rules and distinctions of practical value, which will be found to be instructive and convenient for reference. The first chapter relates to the origin and history of jury trial, the reading of which, as of the entire book, leaves our faith in the wisdom of trial by jury still unimpaired. We still think that after due allowance is made for the ignorance, prejudice, and sometimes even downright dishonesty of now and then a juror—their deliberations, their comparisons of judgments, out of which sometimes bitter and often long struggles and conflicts of opinion—there comes in the long run a just verdict. It should not be overlooked that if, in a given case, there is mistake of law or fact, or something worse, it is always in the power of the court to set the verdict aside and send the parties back to another trial. And it would be wise, we think, if this power were exercised

oftener than it usually is. It is reported that a distinguished judge said: "When I was first appointed I determined never to let the jury know what my opinion of the merits of the case on trial was. I followed that rule for a year or so, and was dissatisfied with it, and after that took care that in every case the jury should know what my opinion of the case was. But I left it to the jury to decide, and seldom disturbed their verdict." It may be that the judge was right in the last determination.

We must here take our leave of Mr. Proffatt and his book for the present. Few, if any, works of man are perfect, books not excepted. Even standard coin is only nine hundred in one thousand parts pure gold, though the other one hundred parts of alloy must be copper or silver. Doubtless Mr. Proffatt may enlarge, and, perhaps, also amend this book on a second edition, but it is pretty well up to standard, and it is, moreover, in the right direction. It is in the interest of law, manners, and morals. It states the law as it is; it points out the advantages of decency and a becoming manner in practice over browbeating and indecency; and it shows how utterly unworthy of the profession he is who, instead of seeking to discover the truth by cross-examination, tries to confuse and mislead an honest witness so as, apparently, to make him lie.

S. J. T.

WOODS' REPORTS. Vol. II. Cases Argued and Determined in the Circuit Courts of the United States for the Fifth Circuit. Reported by WILLIAM B. WOODS, Circuit Judge. Chicago: Callaghan & Co. 1877.

In this circuit no reports have ever been published until the present series, the reporter of which is William B. Woods, who is the circuit judge. This second volume well sustains the reputation of the preceding one. Judge Woods, like Judges Waite and Dillon, delivers short and terse opinions, and quits the argument when he gets through with the case in point.

His circuit is composed of Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas, and the great questions which grew out of the late war between the states, and the subsequent reconstruction of those state governments, are in this book ably discussed.

In *Kimball v. Taylor*, p. 37, based on *The Grapeshot*, 9 Wall. 129, full effect is given to the principle that the existence of martial law does not prevent the administration of justice between the citi-

zens in the civil courts, and their judgments and decrees will be binding on the parties. These decisions affirm the validity of those civil courts of Louisiana permitted to continue their functions under General Butler's orders, in 1862-63.

In *McComb v. Board of Liquidators*, p. 48, which case was afterwards substantially affirmed, on appeal, in 92 U. S. 531, it is held that when a state officer refuses to perform a plain official duty requiring no exercise of discretion, any one who shall sustain personal injury by such refusal may have a *mandamus* to compel its performance, and, in a proper case, may have the correlative writ of injunction. And it is further held that if, in either case, the officer plead the authority of an unconstitutional law for non-performance or violation of his official duty, it will not prevent the issuing of the writ, an unconstitutional law being treated by the courts as null and void.

In the several cases of *Wilmer v. Atlanta & Richmond Air Line Railway Company*, pp. 409 and 449, it is held that where a railroad extends through several states the circuit court can appoint a receiver at once for the entire line through the several states, sell the entire road, giving a clear title thereto, and a sufficient reason to exercise such jurisdiction arises where the railway had fallen in the hands of two different courts; and Bradley, circuit justice, said, that when two suits between different parties, raising different controversies and having different purposes in view, are commenced in courts of coördinate jurisdiction, and the possession of the property which is the subject of the suit is necessary to the relief asked in such case, that court which first seizes the property acquires jurisdiction over it to the exclusion of the other, in the matter where the suits were commenced or process *in personam* served.

The historic case of *Stanton v. Alabama & Chattanooga Railroad Company*, p. 506, in which the leading lawyers of Alabama have been making a living for half a dozen years, and in which such an eminent lawyer as Philip Phillips, of Washington City, acted as receiver in chancery, it is held, following *Meyer v. Johnston* (Alabama Supreme Court), 4 C. L. J. 111, that receivers' certificates, issued under orders of court, to complete and preserve the railroad pending litigation, are a lien on the railroad superior to the mortgage, but that, though payable to bearer, they are not commercial paper.

In case of *Davenport v. Same*, p. 519, it is held that, while

railroad is being operated by the receivers, a passenger, for injuries inflicted on him, is not entitled to payment out of the earnings of the road in preference to the bond-holders, unless it was so stipulated in the orders of the court appointing the receiver.

In this volume is reported the important case of *Lehman Bros. v. Strossburgher*, p. 554, which was reviewed heretofore in 3 C. L. J. 134. This case decides that the factor can enforce the collection of balances due him on "option deals," or losses on "puts" and "calls," as they are termed in trade, in adjustment of differences paid by him for account of such option dealer, as also his commissions charged thereon. Hence the factor, agent, or commission merchant, can recover for his advances on a contract which is *malum prohibitum*, provided it be not *malum in se*. This case is in seeming conflict with Judge Blodgett's opinion in *Chandler, Pomey & Co.*, 1 C. L. J. 200, and *Waterman v. Buckland*, in St. Louis Court of Appeals in 1876, and surpasses both in argument and research.

On *habeas corpus*, *Dock Bridges ex parte*, p. 428, holds—what was hitherto unknown to the profession—that perjury committed in the course of a judicial investigation, conducted under authority of acts of Congress, being an offence against public justice of the United States, is *exclusively* cognizable in the courts of the United States. Thus, the prisoner was taken out of the Georgia penitentiary on *habeas corpus* issued by Judge Woods, and was afterwards put upon trial in a federal court for the same offence.

Chittenden & Co. v. Doulen & Holston holds that federal courts have no jurisdiction to institute suits by the process of foreign attachment, and that the mere giving of a bond by a non-resident for the release of his property from such process is not a voluntary appearance therein, and that a service of summons *in invitum* while in the district does not give jurisdiction; and, further, that commissioners of the Circuit Court of the United States have no power to issue writs of attachment.

In *Brownsville v. Cavqos*, p. 293, and *Hommekin v. Clayton*, p. 336, it is held that the federal courts in Texas will take judicial notice of the laws of Mexico while Texas was under her dominion, on the ground that the laws of the former sovereignty of a country, which still affects its landed estates, are to be recognized as domestic, and not foreign, laws.

Chuck & Bro. v. Mesritz decides that if a debtor in embarrassed circumstances enters into any arrangement with all his creditors to

pay them a certain proportion of their claims in consideration of a discharge of their demands, and he privately agrees to give better or further security to one than to the others, the contract with the other creditors is void.

In *Robinson v. Gallier*, p. 178, it seems that James Gallier, husband, aged 68, and Catherine Gallier, his wife, aged 44, were lost at sea in the "Evening Star" steamship, and there was no evidence as to which perished first, and a considerable estate was to be distributed on the presumption of survivorship. Under the Louisiana civil code, in the absence of the circumstances of the deaths, the presumption was that the male perished first. The court held that where the title of the plaintiff, who seeks to disturb the possession of others, depends on the fact that the person under whom he claims survived another, though both perished in the same event, and the case admits of no presumption of survivorship, the burden of proof is on the plaintiff to establish the fact of survivorship. If it appear that both persons perished at the same instant, or if it shall be impossible to declare from the evidence which perished first, plaintiff must fail. The case is a clear statement of what has been hitherto the speculation of text-writers.

The cases of *Featherman v. State Seminary*, p. 91, and *Peters v. City of New Orleans*, p. 100, hold that public educational corporations under state control and municipal corporations cannot be subjected by their creditors to execution, garnishment, or attachment, in any way whatever.

In *Levi v. New Orleans Insurance Association*, p. 63, in an admiralty collision case, Judge Woods attempts a few successful definitions and succeeds well. He defines *misconduct* to be a transgression of some established and definite rule of action, where no discretion is left except what necessity may demand, and that *negligence*, *carelessness*, and *unskilfulness* are transgressions of some established but indefinite rule of action, where some discretion is necessarily left to the actor.

Copley v. Sewing Machine Company, p. 494, holds that a corporation is liable in an action for malicious prosecution, and states the clear tendency of modern judicial opinion to be, as in 21 Howard, 202, 37 Alabama, 560, "that corporations are liable for the wrongful and tortious conduct of their agents and employees to the same measure of responsibility as natural persons."

The case of *Mitchell v. Lippincott & Co.*, p. 469, is one in which a married woman mortgaged her separate statutory es-

in Alabama, and when creditor proceeded to foreclose she procured a permanent injunction against the sale. At the time of the execution of the mortgage the state courts of Alabama held such mortgages valid. But at the date of this attempted foreclosure the state courts of Alabama had overruled those previous decisions. Judge Woods holds that the federal court does not adhere to the law as constituted by the state court at the time the contract was made, but in a case touching real property, of which this case is one, the federal court is bound to follow the latest state decision, following *Alcott v. Supervisors*, 16 Wall. 698. Should the Alabama courts again return to the former ruling, as its later decisions indicate, *then* federal courts will also return to that ruling, because it is a question touching real property of that state.

These cases afford a mere glimpse of the book. Suffice it to say, in conclusion, that this second volume of Woods' Reports is brimful of important causes, judiciously selected out of the mass of causes in the Fifth Circuit, and these causes have been well considered and equally well reported. No lawyer who practises in the federal courts will fail to frequently consult them.

R. C.

A TREATISE ON THE LAW OF EXECUTIONS IN CIVIL CASES, and of Proceedings in Aid and Restraint thereof. By ABRAHAM CLARK FREEMAN, author of a Treatise on the Law of Judgments, and also of a Treatise on the Law of Cotenancy and Partition. San Francisco: Sumner Whitney & Co. 1877.

Mr. Freeman is well and favorably known to the profession by his previous works on "Judgments" and "Cotenancy and Partition." In the preparation of the former work he received an admirable preparation for the thorough treatment of the law of executions. The subjects are intimately related, and the latter is really the consideration of the various questions which may arise from the obtaining of the judgment until the judgment is satisfied by payment. That there was need of such a work is manifest when it is considered that the law on the subject is found in over ten thousand cases, found largely in the American reports. It is true there had been a collection of cases on the subject in a book having a similar title, but in law-book making there is a necessity that the author shall read the cases as well as collect them; this, we believe, Mr. Freeman has conscientiously done. For the purpose of testing the thoroughness of his work we examined to see if

any of the Missouri cases were omitted, and whether the cited were understood—not to insinuate that Mr. Freeman not understand the cases if he should read them, but to determine whether or not, in the haste of compilation, he might have the unsatisfactory reflection of the syllabus, or the paragraph digest, as the actual law of the case. If, then, the cases in state of Missouri are properly represented, we may rightly think that the vast body of the law in the other reports are properly treated.

We note an omission, under § 44, note 3, of the cases of *St. v. Chouteau*, 11 Mo. 382, and *Dillon v. Rash*, 27 Mo. 243, which are directly in point.

Of the other class of errors we note, under § 163, that the author errs, as to the law in Missouri, in stating "that the obligation existing against the garnishee in favor of the defendant should be payable in money," and not in goods or effects; and, to sustain this position, cites the case of *Weil v. Tyler*, 43 Mo. 581, when the law of the state directly provides that goods, property, and effects may be garnished, and the decision recognizes the law to be so. In *Weil v. Tyler* the garnishee in that case had made a note to the defendant, payable in brandy at \$5.00 per gallon, and, after the process of garnishment had been served, the court held that a money judgment could not be obtained on such note until there had been a demand on the garnishee and refusal to pay in brandy, and that the attaching creditor has no greater rights than the execution debtor. The Missouri constitution provides for garnishing personal property, and that the garnishee may relieve himself by paying the money value or delivering the property to the officer, and for a valuation and a money judgment if the garnishee refuses to turn over the property. The case of *Weil v. Tyler* decides that a money judgment cannot be rendered against a garnishee having property in his hands unless he has had an opportunity of turning over the property to the officer, or unless it has been found the value of the property which the garnishee refused to deliver; and, further, that an attaching creditor, seeking to hold the maker of a note payable in property, must follow the same course necessary for the holder—that is, to first demand the property, and, on refusal, to treat the demand as a money demand for the value of the property.

Of the author's industry in the collection of cases we have no opinion. The late volumes of the state reports and the periodicals have been carefully searched. At the present time

large mass of law is found in the legal periodicals, and no author can afford to disregard this source of material if he expects to present to the profession a comprehensive review of the law at the date of publication.

The style is clear, concise, and intelligible, entirely free from the careless, slovenly manner of some writers who commence two-thirds of their sentences with "and where," "so where," and "but where," giving nothing but case after case strung together like beads upon a string. The doctrine of cases can be stated in the shape of propositions of law, much better both for the comprehension of the reader and for the sake of elegance of style. In a text-book it is seldom advisable to set out the facts of the case with any degree of fullness; it is an evidence of indolence on the part of the writer, and of an intention to force on the reader the labor of abstracting the propositions for himself. The use of the expression "agriculturalist," in the body of § 224 and in the head of the chapter, and again in § 225, is unfortunate, as Webster does not recognize it as a word. If Mr. Freeman had not used the expression at the head of the chapter, we might have supposed that it crept in by absorption from some opinion he had just been reading, in which the judge had decided a point concerning a party denominated an "agriculturalist," and that he felt some hesitation in applying the law so held to the well-known respectable body of "agriculturists." Again, in § 277, the expression "whoever's benefit" is bad, but this also probably crept in from some opinion in which it had been used.

The division of the subject is logical, and the arrangement very convenient, so as to render the various topics readily accessible. The plan of giving the headings of each section at the head of the chapter, and printing the catch-words in solid black type, will save much labor to those who use the book; besides, the typographical appearance of the book is much improved thereby. In treating the subject the author was compelled to examine a number of collateral subjects; for instance, in the chapter on "Personal Property Subject to Levy and Sale," it became necessary to examine the subject of "Fraudulent Conveyances," and the necessity of change of possession and delivery to satisfy the requirements of the Statute of Frauds. In the chapter on "The Lien of Executions" there is an excellent and well-considered note on the effect of bankruptcy on the lien of executions, and the enforcement of executions after proceedings in bankruptcy have been commenced, and also a col-

lection of the cases on conflicts where writs have issued from state and federal courts. The chapters on Exemptions and Hints will be found exceedingly useful, and those on "Proceedings at Law Supplemental to, or in Aid of, Execution," and "Proceedings in Equity in Aid of Execution, and to Reach Equitable Results," are both useful and new.

Our general impression in concluding the perusal of this work is that Mr. Freeman has supplied the profession with a treatise which covers the whole subject, which will displace all other efforts on the same subject, and be for many years the only text-book on executions.

H. E. M.

AN ABRIDGMENT OF ELEMENTARY LAW. Embodying the General Principles, Rules, and Definitions of Law, together with the Common Maxims and Rules of Equity Jurisprudence, as stated in the standard commentaries of the leading English and American authors; embracing the subjects contained in a Regular Course, collected and arranged so as to be more easily acquired by Students, comprehended by Justices, and readily reviewed by young Practitioners. By M. E. DUNLAP, Counsellor at Law. Second edition, revised and enlarged. 8vo. St. Louis: Scott, Thomas & Wentworth. 1876.

Nearly every faithful student of the law has at least begun, and many have continued late into actual practice, the habit of keeping up a sort of *index rerum*, or private note-book, of the most important declarations of principles, definitions, rules, axioms, maxims, as he came to them in the course of study, in order to store them in his mind that no subsequent course of thought or study could drive them thence.

While the dreary monotony of reiteration, which in his law-school-days impressed his mind, is wanting when he comes to the higher estate of a student of law, there remains to him a sense of the need of a similar discipline in comprehending and retaining those inevitable formulæ which, although less monotonous, are quite as indispensable as were his declensions and conjugations. He, therefore, from force of habit, from the sense of duty, or from a consciousness of the vast importance of every fresh step he takes in this new and unknown pathway, jots down from time to time the more important principles, definitions, and rules, as landmarks of his progress, returning to them again and again until they become fixed indelibly in his memory. No two students, however

will perform this necessary task alike, and few will do it so well that the necessity for revision and correction does not become discouragingly apparent as the course of study proceeds. When, therefore, the student can find this task already done to his hand, with infinitely more ability and care than he is likely to bestow upon it during his course, and can, after a thorough digestion of his author's work, go over it all in skeleton, fixing its *results* in his memory by grasping its whole in one comprehensive view, he is enabled to complete his labors with undoubted benefit to himself, and with satisfaction to his instructors.

Such a work is the one before us, in which the author's aim has been to bring out in bold relief all the most important principles, the fundamental definitions, the rules and maxims, and formulæ of science of the law, in such a harmonious and comprehensive chart, that he who sails over the roughest seas, and threads the most intricate and rocky channels of that great hungry ocean—the law—need scarcely steer amiss nor fear a shipwreck on his way to the bar.

Nothing, it would seem, were needed to make the value of the book apparent beyond the simple statement that of the first edition, published some three years since, about three thousand copies were sold, and that of the present enlarged and revised edition about twelve hundred copies have been already sold. The plan, embracing, as it does, the germ and pith of the law as found in Blackstone, Greenleaf, and the leading authors on Contracts, Pleadings, and Equity, covers the entire elementary course; and a new department, entitled *Suggestions to Students*, is at once a treat and a treatise in itself. The mechanical work is appropriate and fully up to the best standards, some novelties of typography contained in it being especially pleasing and valuable. C.

NOTE.—We have received the following books, of which reviews were prepared, but crowded out of this issue for want of space. They will appear in our next:

"Abbott's Practice United States Courts;" vol. 1; third edition; New York: Ward & Peloubet. "Bateman's Constitutional Law;" St. Louis: G. I. Jones & Co. "Bishop's Criminal Law;" 2 vols.; sixth edition; Boston: Little, Brown, & Co. "Burrill on Assignments;" third edition; New York: Baker, Voorhis & Co. "Field on Damages;" Des Moines: Mills & Co. "Field on Damages;" second edition; Des Moines: Mills & Co. "Hubbell's Legal Directory;" New York: J. H. Hubbell & Co. "Warren's Ten Thousand a Year;" New York: Cockcroft & Co. "Yerger's Reports;" Cooper's edition; vol. 4; St. Louis: G. I. Jones & Co.

IX. NOTES.

MISSOURI REPORTS.—Two bills are now before the Missouri legislature providing for the publication of the Missouri Reports. One of them is wisely planned and carefully drawn. Its object is to secure good reports at a fair compensation, and good reports at a moderate price. Its provisions are few and simple, and adequate to the end proposed, and we trust it will pass at an early day. It provides for the appointment of a reporter by the supreme court, who will hold office during their pleasure. He will be an officer of the court, and will be paid by the state. The secretary of the court, auditor, and attorney-general are required to contract with some suitable persons to publish the reports for a term of six years. The state will be furnished the copies it needs at ten per cent. above cost of manufacture; the price in no event to exceed two dollars and fifty cents per copy; the price of the profession in the state not to exceed three dollars and a-half. In mechanical execution the reports must equal a certain standard—Fortieth Reports being that designated in the bill.

That the supreme court should appoint the reporter is manifestly right. That the reporter should be paid a salary from the state treasury has been questioned. But it seems to us that those who question the expediency of this provision have not considered, first, that it will make no practical difference, or, indeed, is rather favorable, to the state treasury; and, second, that the reporter's work will almost certainly be better done if, having certain matter to do, he receives from the state a competent salary for doing it, than if he depends for his pay upon the publishers of his reports. To show that it makes no practical difference to the state treasury requires but a moment's consideration. The profession throughout the country can testify that where the reporter has depended for compensation upon his publishers or upon the sale of his reports, he has put, as he has had an undoubted right to do, a small amount of matter into his volumes as the law allowed; that if, on the other hand, say, having a certain amount of matter to publish, the tendency has been to make of it as many volumes as possible. We do not propose to discuss the ethics of this matter here. Doubtless, the office of reporter under these circumstances is a thankless and poorly paid office. Indeed, we know it is so in many cases. But what we wish to call attention to is the effect of this method of publishing reports on state treasuries in general, and on the state of Missouri in particular. Of late years there have been published an average of over three volumes a year of Missouri Reports. The state buys for its own use over five hundred copies of each volume at the fixed price—two dollars and seventy-five cents per volume. The state, therefore, has been paying between six and seven thousand dollars a year for the publication

the reports. If the bill we are considering becomes a law, it so much increases the amount of matter in each volume of the reports that two volumes a year will be sufficient—probably more than sufficient—to contain the cases which will be reported. Should two volumes be issued each year, and the state have to pay for the copies it must have (somewhat over five hundred) the limit price—two and a-half dollars a volume (it is possible, even probable, that an offer will be made to furnish the state copies for a less figure)—the cost to the state for copies of the reports would be about twenty-five hundred dollars; to this add the reporter's salary, and the total cost to the state annually under this bill will very little, if at all, exceed five thousand dollars. Against this, place the six or seven thousand dollars a year which the state has recently paid, and it at once becomes apparent that the payment of a salary to the reporter and the publication of the reports under the proposed scheme is a benefit to the state treasury rather than a drain upon it.

Another advantage will result from the passage of the bill. The Fortieth Iowa Reports is a well and substantially made book. Its appearance reflects credit on its publishers, and is another bit of evidence of the fact that the East does *not* monopolize the capacity or taste for manufacturing good books. The Missouri Reports must hereafter equal this volume in quality of materials used and workmanship. A blot on the fair fame of Missouri and St. Louis will be then removed; a blot that means dollars and cents to the manufacturing interests of this state and city. It is not a very large blot, to be sure, but it is a black and ugly one, and no expense or pains ought to be spared to remove it. No city or state that pretends to any reputation as a manufacturing community can afford the reputation of a capacity for making, and an obstinacy in making and forcing on its customers, wares of the meanest workmanship and materials. This is especially true of a city that comes into sharp and daily competition with other manufacturing cities, who are using their every effort to drive it from the market and monopolize its trade by producing excellent goods at the lowest price they can be afforded at, as against the meanest goods at about the same price.

We ask the critical attention of members of the legislature, and of others interested, to the mechanical execution of the last volumes of the Missouri Reports. We have examined them with some care. We are not unacquainted with the manufacture of books. We have seen and examined works printed in New Zealand, in Idaho, in Oregon, and some printed in Tennessee and North Carolina before the beginning of the present century. We are not unacquainted with what can be done in the way of bad printing, as well as good, and we are compelled to admit that we would not have believed the last volumes of the Missouri Reports *could* have been produced in a civilized country. We can think of but one or two specimens of printing which equals them, and they are copies of newspapers printed at Richmond, Va., in 1864-5. We are not speaking now in a moment of excitement, nor do we, we are sorry to say, exaggerate the truth. We can but stand in speechless admiration of the sublime audacity of the man who could offer the Sixty-second Missouri Reports to the state, and demand in payment therefor a sum amply sufficient to have paid for a handsome book. No one can appreciate to its

full the inspiring sense of the sublime that fills one in viewing this transaction, without knowing at how *small* an additional expense this and other volumes could have been made to take a reputable appearance. We should be glad to go on and show minutely, did space permit, how few dollars we have done it; but we have already said more than we intended.

We hope, therefore, that the bill will pass. Its provisions are calculated to give the profession and the state excellent reports at a moderate price. It is essential it is that cases be well reported, the profession well known. In fact it is scarcely too much to say that a poor opinion well reported is of as much value as an able opinion badly reported. It is, moreover, of very great importance to the literary, publishing, and printing interests of St. Louis, in their infancy, that a stop should be put—and that at once—to the injury to the reputation of this city that the manufacture of such books as the volumes of the Missouri Reports will effect. Cities of established reputation for good work in publishing could stand it—perhaps; St. Louis cannot.

The other bill that is before the legislature provides that the legislature shall contract with Mr. C. A. Winslow for the publication of the reports. He offers to be reporter and publisher, and to furnish the state and profession with the reports at three dollars per volume, *with certain contingencies to be paid him by the state besides*. We emphatically hope that this bill will not receive serious consideration. It is as unwisely framed for the state as the other is wisely framed. It is as complicated and uncertain as the other is simple and direct, and in all complicated contracts the state is almost certain to get the worst of the bargain. With the present sale of the Missouri Reports the work of reporting and publishing the decisions cannot be well done for three dollars a volume, under the present or any system of reporting which this, or any bill before the legislature, proposes. We do not like the bill because it is complicated and inadequate, and trust it will not, we do not believe it will, be seriously considered.

THE VACANT JUSTICESHIP—THE HON. WM. FRIERSON COOPER. A year ago, in the REVIEW for April, 1876, we concluded a brief biographical sketch of the distinguished jurist whose name appears at the head of this article, with the recommendation that the occurrence of a vacancy on the Supreme Bench of the United States should be made the occasion of promoting to that bench the subject of the sketch. Now that the vacancy has fairly occurred by the retirement of Judge Davis, we take the occasion to renew our suggestion. We do this with the more earnestness because public attention is at present directed in an unusual degree toward the subject in recognition of the facts which a year since we urged in support of our recommendation, and because Chancellor Cooper is himself a distinguished example of the class of men whom the almost universal voice of the nation is now calling to prominent positions in its councils. Our readers, North as well as South, are familiar with the fact that our LAW REVIEW is *Southern* in no sectional sense, but aims to illustrate as well as to develop the legal and juridical abilities of the Southern Bench and Bar, who are Southern in part from geographical reasons; and our purpose is, we think, well understood.

sustain and encourage the talent that adorns the judicial and legal circles of the South simply as its merits and its successes deserve. In this spirit we confidently join in the wish, so generally and earnestly expressed, that the South may now be called upon to contribute her greatest talents and her foremost men to the service of the general government; not merely because they are Southern, but because the nation needs, and the people demand, *the best men*, irrespective of sections. It is unnecessary to advert to the causes which have led to the absence of judges of Southern birth from the Supreme Bench. We look now to the future; and we glance at the past no further than to observe, as has been by others stated in the public press, that "the very reason that has operated to keep jurists of the South from the court heretofore now calls for the recognition of that section." The South suggests no displacement of any one from office in asking that she be assigned a representative on the bench of that high tribunal, which, in these modern times, hears and decides so many legal questions of Southern origin. Surely no man can be more fit to aid in the decision of such questions than a Southern jurist, of acknowledged rectitude, repute, and erudition. Surely no plan looking to a complete reunion of hitherto discordant elements can be dictated by higher or more practical wisdom than that which contemplates the calling of Southern talent and culture into the council chambers of our highest court.

The fitness of such an appointment is manifest from considerations of a purely local character; and we may be allowed to press the local claims of the South without the suspicion that we are swayed by sectional motives. The section of the country which loses the retiring justice of the Supreme Court has still several representatives in that illustrious body. The South has none. But, further, the South sends up to that court far more cases to be there litigated, and far more litigation of magnitude and importance, than any other section, not even excepting the North and West. Is it not to the interest of the whole people that the locality thus fertile in litigation shall contribute of its trained talent and experience to the solution of these vexed questions, which must inevitably possess more or less of local peculiarities and distinctions? We urge these as reasons of *national importance* in favor of the advancement of such eminent Southerners as Chancellor Cooper.

But the reasons for filling with a Southern appointee the present vacancy in the Supreme Bench are, in our view, no more cogent than those which point particularly to the man we name as a fit selection. We will not here repeat the sketch of his career which we presented a year since, but we refer to it as disclosing in its subject precisely the characteristics which commend him to the present public tastes and demands. For thirty years prominent in the juridical circles of his native state; the frequent candidate of his professional brethren for judicial honors, which he modestly declined; the analytic arranger of the Tennessee Code; a judge for a brief period of the Supreme Court; and, later, for five years an honored and distinguished chancellor, as well as the erudite editor and annotator of the reprint of the Tennessee Reports, and in all these positions achieving a singularly high reputation for talents, learning, and integrity, his experiences have certainly been sufficiently varied and diversified to make him acquainted with all the phases and aspects

of judicial duty. That he has found time and opportunity, in the midst of all this active professional and official labor, for thorough and extensive study and culture in the intricacies of the law, testifies of his industry and his faithful devotion to the "jealous mistress." But Judge Cooper is also and widely known as an equity lawyer of far more than common ability. His published decisions as chancellor have given him just rank with the celebrated American chancellors, and have testified more substantially than did his previous repute of his very great familiarity with all the principles and canons of equity jurisprudence.

It is because we believe these qualities in Chancellor Cooper, which we have thus alluded to, and others of which we have not space to speak, and his long and noble record of great public service on the Supreme Bench, that we have ventured to press our views of the eminent fitness of his appointment. We have not thought of his politics; we believe he is a Democrat of very much the same stamp as Judge Davis; but the important fact is that in an intensely partisan community his reputation, so distinct and so marked, has been obtained exclusively outside of party politics; and it furnishes an additional recommendation which should be of value at any time, but most of all at a time like the present when "he serves his party best who serves his country best." Possessed of what we esteem to be the highest qualifications for high office, yet too modest to sound his own praises; guarded, by the enjoyment of a comfortable competence, from exposure to the ambitions of the office-seeker, yet free from the lofty ambition to discharge with sincerity and fidelity the duties of advocate or judge; and, with the ability to administer justice impartially, loving the administration of justice for its own sake; we believe his presence upon the Supreme Bench would add dignity to its deliberations and lustre to its fame.

THE BAR AND THE ELECTORAL TRIBUNAL.—If the party divisions and the complexity of the Tribunal and difficulty of ascertaining what were the grounds of the decisions sapped the case of a great deal of its interest, other causes detracted from the interest of the argument of counsel. Taking all the arguments in the Florida and Louisiana cases together, a stranger who heard them would be apt to form a rather unfavorable impression of the bar of this country. Here were assembled in one court-room and pitted against each other the best and most noted lawyers in the United States, and yet they made, on the whole, little more than a respectable appearance. When the Florida argument began it seemed as if this were to be a real *cause célèbre*; but when the Louisiana argument was over, the whole thing seemed like an undigested legal mass, without parties to the action, without an issue, without any means of distinguishing the law and the facts. No doubt a great deal of this was due to the shortness of the time and to the want of method in the proceedings of the Tribunal. In the Florida case there was no distinction made between law and facts at all. Everything was argued together, and at the end it was impossible for counsel to know what sort of proposition was offered by the objectors, what rules of evidence had been adopted, and what evidence had been excluded. The Tribunal permitted a long argu-

with regard to Louisiana on the admissibility of evidence of fraud; but if the Florida arguments meant anything, they meant that the Democrats intended to show fraud in that state, and this having been decided against them, what was the object of going over the ground again in another state? In most cases a lawyer knows beforehand what precise points he has to meet at any given stage, and, if he is surprised, generally has time given to prepare himself; but in this case it was almost impossible to tell in advance what shape the issue would take, and once or twice lawyers suddenly found themselves obliged to address the court at length on some point which ten minutes before had been allotted to other counsel to argue. Mr. Merrick, who made one of the best speeches in the Florida case, was, we believe, in this plight.

But, taking all this into consideration, the arguments still left a good deal to be desired. There was no deficiency of legal ability—the case was thoroughly fought over at every point; but there was something lacking in almost all the arguments. They were in what might be called a raw state. They had little or no beauty of finish or form, and so were deficient in what gives forensic oratory its chief charm. It is not necessary to go back to ancient Rome for a model of classical style; in fact, it is not necessary to go further than Massachusetts for an example. It would not be difficult to have picked out of the generation of lawyers headed by Webster and Choate a dozen men whose arguments in such a case as this, besides having the merit of solidity, would have had the perfection which an artistic form can alone give. It has always been in the past the ambition of every great arguer of cases to unify and vitalize his other mental possessions by this final charm, and no one knows better than they do that the durability of their professional reputation will be in strict proportion to their success. Of course, the artistic sense in a legal argument may show itself in a variety of forms. It may take the form of a perfectly lucid and logical exposition, as in the remarkable arguments of the late Judge Curtis, which almost produced the effect of being a final decision of the case by a perfectly unbiased judge, rather than a statement of his own side; it may take the form of vehement analytic demolition of his antagonist, as in Mr. O'Connor's arguments; it may take a variety of other forms; but when it is conspicuous by its absence, there is a sense of something wanting in the legal presentation of any case which is painful. Whatever may be the explanation, high finish was not the "note" of most of the addresses made before the Tribunal.

The disappointment in the case, as a case, we do not give as a feeling of one or two persons, but as one shared, we think, by most lawyers who heard it. It was really a test of the actual condition of the bar, its material, and its fitness to reply to a sudden demand upon its resources, such as has not been applied before in the history of the country; and most lawyers who watched the proceedings must involuntarily have asked themselves whether the bar would have stood the test better thirty or forty years ago, or whether, on the whole, the case was really as ably managed by the distinguished counsel in charge as it ever would have been.

Optimists would answer this question in one way, pessimists in another; but without any undue depreciation of the legal glories of the present day, it

is probably fair to say that, professionally, the case would have been a better case throughout a generation ago. We have chosen in this country to try an experiment with the profession which could not be tried with any profession or in any country successfully. We have steadily subjected judges to the influence of politics by teaching them to beg their seats on the bench at party caucuses and conventions; by packing courts to secure favorable decisions; by breaking down all the barriers to admission; by using even the general judiciary throughout half the country to keep in power the party to whom the judges owe their appointments. It is idle to suppose that this system produces no results beyond the particular judges whom it immediately affects. It has remote effects, too, and to any one who takes a speculative interest in the remote effects of such social and administrative changes, many curious subjects of reflection might be suggested. If these changes have not, on the whole, altered the relative positions of bench and bar, where did an eminent lawyer like Mr. Jeremiah Black acquire the impression that the true way to enforce an argument was to browbeat and intimidate the court? Before the poison of patronage had begun to have its effect on the judiciary, would the judges of the Supreme Court have divided on the question of the executive succession politically, or would they have made every effort, and even sacrificed, to arrive at a unanimous and non-partisan decision? Before the profession became a trade, would such arguments as Mr. Matt. Carpenter's, so strong as it undoubtedly was, command the respect they now do? If there had been extant a high professional standard of honor, would Judge Davis have been the only lawyer out of those originally suggested as Commissioners to decline to serve? Finally, if legal education and drill were what they once were, could legal oratory, in point of form and finish, be as poor as most of that brought out before the Tribunal?—*The Nation*.

X. DIGEST IN BRIEF OF RECENT CASES

REPORTED IN FULL IN LAW JOURNALS SINCE JANUARY 1, 1877.

PREPARED BY S. OBERMEYER, ESQ., OF THE ST. LOUIS BAR.

[The object of this department of the REVIEW is to advise our subscribers of points decided in the latest reported cases, and to show where they can obtain, at very small expense, full reports of cases in which they have an interest. To this end the points decided are briefly and pointedly given, with the abbreviation and date of the journal where the case is reported in full. The price of single numbers of each journal is also given, which price, remitted to the address given, will secure a copy of any desired issue. This department of the REVIEW will be continued if approved by subscribers. We shall be glad of subscribers' opinions concerning it.]

NAME.	ABBREVIATION.	ADDRESS.	PUBLISHED.	PRICE.
Albany Law Journal.	Alb. L. J.	Albany, N. Y.	Weekly.	15 cents.
American Law Record.	Am. L. Rec.	Cincinnati, O.	Monthly	50 cents.
American Law Register.	Am. L. Reg.	Philadelphia, Pa.	Monthly.	50 cents.
Central Law Journal.	C. L. J.	St. Louis, Mo.	Weekly.	50 cents.
Chicago Legal News.	C. L. N.	Chicago, Ill.	Weekly.	10 cents.
Pacific Law Reporter.	Pac. L. Rep.	San Francisco.	Weekly.	50 cents.

ACTION.—Form of, against trustees of a corporation personally liable to creditors for excess of indebtedness over capital stock; Excess a fund for all creditors; Action at law cannot be sustained; The remedy is in equity.—*Hornor v. Henning*, Sup. Ct. U. S., C. L. J., Jan. 12, p. 29.

—Statutory; Action under statute by wife against person selling liquor to husband sounds in *tort*, and plaintiff may recover if she proves habitual drunkenness caused *in part* by defendant's act; Evidence in such actions as to loss of situation by drunkard, etc.—*Roth v. Eppy*, Sup. Ct. Ill., Am. L. Reg., Feb., p. 112; *s. c.*, Am. L. Rec., Mar., p. 532.

ADMIRALTY.—Maritime liens; Home-port; Residence of owner; Place of enrolment.—*The Albany*, U. S. Cir. Ct., D. Minn., C. L. J., Jan. 5, p. 16.

—In libel, by insurer to recover of carrier, through whose wrongful act loss occurred, amount of loss, carrier cannot set up as a defence that insurer was not legally bound to indemnify insured; Such libel is properly filed in name of insurer.—*Amazon Ins. Co. v. Steamboat Iron Mountain*, U. S. Dis. Ct., S. D. Ohio, C. L. J., Feb. 2, p. 103; *s. c.*, C. L. N., Feb. 3, p. 157.

—Maritime torts; Jurisdiction over.—*The Florence*, U. S. Dis. Ct., E. D. Mich., C. L. J., Mar. 16, p. 249.

—Collision; Owners of a vessel held not liable for damage caused by sudden breaking down of a machine in which there was an inherent latent defect, without fault on part of user of machine.—*The Virgo*, Prob., Div. and Adm. Div. High Ct. Just. (Eng.), C. L. N., Jan. 6, p. 126.

—Within what time a decree may be opened.—*Russell v. Schooner Oriental*, U. S. Dis. Ct., N. D. Ohio, C. L. N., Jan. 13, p. 134.

—Motion for security by respondent in the amount claimed in the cross-bill may be made; But must be made with reasonable promptness, and not on eve of trial after case is ready to proceed.—*The George H. Parker*, U. S. Dis. Ct., E. D. Mich., C. L. N., Mar. 3, p. 191.

ADMIRALTY—Continued.

- Stevedores have a lien on the vessel for their wages.—*McCarty v. Schooner Senator*, U. S. Dis. Ct., N. D. Ohio, Am. L. Rec., Jan., p. 4.
- Suit to enforce lien for labor and materials; The vessel known as *U. S. Revenue Cutter*.—*The U. S. Claimant*, U. S. Dis. Ct., D. Oreg. L. Rep., Jan. 23, p. 25.

ATTACHMENT.—Power to amend in attachment suits is the same as in other actions.—*Tilton v. Cofield*, Sup. Ct. U. S., C. L. N., Jan. 20, p. 189.

- Claim of plaintiff in an action to recover damages for breach of promise of non-resident defendant, held to be within prohibition of schedule of sec. 191, Ohio code, forbidding an attachment against a non-resident for claim other than "a debt or demand arising upon contract, judgment or decree;" Motion to discharge order of attachment sustained.—*Conover v. Creighton*, Super. Ct. Cin., O., Am. L. Rec., Jan., p. 421.

BAILMENT.—Rights of pledger; First and second pledgee.—*Talty v. Freedman Savings and Trust Co.*, Sup. Ct. U. S., C. L. N., Jan. 6, p. 123.

BANKING.—National banks; Mortgage given to a national bank to secure preexisting debt by the mortgagor, and to secure a future loan to him, is valid; the latter *ultra vires*.—*Woods v. People's National Bank*, Sup. Ct. U. S., C. L. N., Jan. 6, p. 125.

BANKRUPTCY.—Proceedings dissolve attachment *ipso facto*; Creditor who obtains judgment in state court in attachment suit within four months after filing of petition in bankruptcy is liable to assignee.—*Bracken v. Johnston*, U. S. Dis. Ct., D. Iowa, C. L. J., Jan. 5, p. 9; *s. c.*, Am. L. Rec., Feb., p. 461.

- Creditors holding liens by attachment are not to be reckoned in computing proportion of creditors who must unite in an involuntary petition.—*Re Scrafford*, U. S. Cir. Ct., D. Kas., C. L. J., Jan. 5, p. 19.

— Composition proceedings; Only one meeting of creditors required; What may be heard; Who may be heard; Passage of resolution; Debtor must appear at meeting; Need not appear at hearing; Hearing; What court must decide; Signatures to resolution; Meeting to vary or rescind proposition; When must be held; Creditor's name on list filed by debtor; Effect; Evidence; Register must take notice of proofs of claims filed by creditor; Attorney appearing for creditor; Dispute between rival representatives; Procedure; Evidence of authority to represent creditor; Effect of omission of assets in statement; Diligence required of creditors.—*Scott, Collins & Co.*, U. S. Dis. Ct., E. D. Mo., C. L. J., Jan. 12, p. 2.

- Proof of claims against an estate are part of proceedings; Writ of habeas corpus will not lie to review judgment of circuit court upon an appeal from the decision of district court rejecting claim.—*Wiswall v. Campbell*, Sup. Ct. U. S., C. L. J., Feb. 16, p. 149.

— Debt of bankrupt created "while acting in any fiduciary capacity" is not dischargeable.—*Woolsey v. Cade*, Sup. Ct. Ala., C. L. J., Mar. 2, p. 202.

— *Similiter*.—*Maddox v. Sharp*, Sup. Ct. Ga., C. L. N., Jan. 6, p. 125.

- Fraudulent preference; What assignee must prove to recover in bankruptcy under § 39 of the Bankrupt Act, against a party who has received a discharge; Reasonable cause to believe.—*Webb v. Sachs*, U. S. Dis. Ct., D. Oreg., C. L. N., Feb. 3, p. 156; *s. c.*, Pac. L. Rep., Jan. 23, p. 28.

— Petition in involuntary cases; Expression "being insolvent or in contemplation of bankruptcy" not synonymous with "being insolvent or in contemplation of insolvency;" Verification of petition by agent of corporation; Supplemental proofs as to act of bankruptcy may be filed.—*In re John Hanibel*, U. S. Dis. Ct., D. Col., C. L. N., Feb. 10, p. 165.

BANKRUPTCY—Continued.

— Transfer of property by insolvent ; Action by assignee to recover value of property ; Assignee must allege either an actual conversion or a demand and refusal to deliver the same ; Damages for detention of, or injury to, property by creditor.—*Schuman v. Fleckenstein*, U. S. Dis. Ct., D. Oreg., C. L. N., Feb. 17, p. 174.

— Effect of discharge ; Bankrupt Act preserves only valid liens, and not mere equitable rights ; How long a judgment is a lien on land.—*Wilcox v. Pollard*, Sup. Ct. Ill., C. L. N., Feb. 17, p. 180.

— Defective proof of debt and deposition to act of bankruptcy ; When may be amended.—*In re John Brown*, U. S. Dis. Ct., D. Col., C. L. N., Mar. 8, p. 191.

— Fraudulent purchase by bankrupt ; When vendor may recover goods from assignee.—*Donaldson v. Farwell*, Sup. Ct. U. S., C. L. N., Mar. 17, p. 210.

— A bank which had suspended, on account of insolvency, resumed the receiving of new deposits under promise of placing them to new account of depositors and of paying *pro rata* instalments on its old indebtedness as fast it could realize on its assets, but finally failed, and was adjudicated bankrupt ; Held, that creditor, who was one of new depositors, had no claim against estate as a preferred creditor, but must share *pro rata*.—*In re The Mutual, etc., Bank of Richmond*, U. S. Dis. Ct., E. D. Va., Am. L. Rec., Mar., p. 571.

— Assignment under state laws ; Conflicting rights of creditors.—*Johnson v. Rogers*, U. S. Dis. Ct., N. D. N. Y., Pac. L. Rep., Jan. 16, p. 17.

— Determination of what are proper items to be charged in marshal's fee-bill in a particular case.—*In re F. L. Hellmer*, U. S. Dis. Ct., D. Oreg., Pac. L. Rep., Jan. 30, p. 35.

— Assignee who has his remedy at law to recover possession of property claimed for bankrupt's estate is not entitled to writ of injunction restraining rival claimant from removing property out of district.—*In re Oregon Iron Works*, U. S. Cir. Ct., D. Oreg., Pac. L. Rep., Feb. 13, p. 50.

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I. THE DARTMOUTH COLLEGE CAUSES AND THE SUPREME COURT OF THE UNITED STATES.

(No. 6—CONCLUDING PAPER.)

Judge Marshall, in his opinion in *Trustees v. Woodward*, opens the discussion with the following characteristic but remarkable statement. He says: "It can require no argument to prove that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application it is stated that large contributions have been made for the object, which will be conferred upon the corporation as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely, in this transaction, every ingredient of a complete and legitimate contract is to be found."

Few men admired Marshall as much as Wirt, who says: "In a bad cause his art consisted in laying his premises so remotely from the point directly in debate, or else in terms so general and so specious, that the hearer, seeing no consequence which could be drawn from them, was just as willing to admit them as not." Nothing could be more applicable than this to the paragraph we have quoted from the opinion.

The vital question was not, as Judge Marshall has put it, whether the charter was a "contract" in a common-law

sense, or some other sense, but whether it was a contract in a *constitutional* sense.

The chief justice had abundant opportunity for knowing the facts. His opinion as reported, as well as that in Baptist Association v. Hart's Executors, and the most essential part of another to which we have already referred, was wrought out by him, at his leisure, during the long vacation between March 14, 1818, and February 1, 1819. He had before him, before his opinion was reported, the special verdicts in these causes, and the stipulations sent up with them; he had heard all that was said by Webster, Hopkinson, Holmes, and Wirt in the first case, and had Webster's brief; he had heard the arguments of Wirt, Pinkney, and Webster in relation to the facts in the other causes, upon the latter's motion for a judgment *nunc pro tunc* in Trustees v. Woodward; he had participated in the conference referred to in the following private letter from Webster to Judge Smith of February 28, 1819, which lies before us as we write:

"Judgment is entered in Trustees v. Woodward as of last Term, that the said Trustees do recover of the said Woodward the aforesaid sum of twenty thousand dollars, so found and assessed as aforesaid; & I have in my bag a mandate to the Superior Court of Judicature of the State of New Hampshire to carry this judgment into execution. So much for that cause & the *second argument* therein expected.

"As to the other causes, Messrs. Pinkney & Wirt have been very much pressed by the Agents and partizans here to argue one of these causes upon the ground of the *new facts*. By the time, however, that we approached near the causes they saw difficulties, and their zeal began to cool. It was impossible to agree on definite facts. It was hardly possible to expect any different result than had already taken place from another argument without new facts. Some of the opinions of the Judges appeared to go so far as to be decisive against them, even taking the new facts for granted. At the same time we heard here the echoes of the clamor in N. H. that the cause had not been heard on its true facts. I called up the subject a day or two before

we should have reached the causes, & desired to know, from the Counsel, whether it was expected to argue one of those causes. This brought on a conversation between Bench & Bar, which finally terminated in this: that the causes should be remanded by consent; that Defts. might, in Circuit Court, move to set aside this Verdict, if they should be so advised, when the opinions of the judges in Woodward's case should be read & known—I found this course would *be agreeable*, & adopted it at once. In truth I did not want a second argument here upon an *assumption* of facts. If I do not misjudge, we shall have no difficulty in the Circuit Court. We shall not, I trust, be called on to agree on any more Special Verdicts.—If the Defts. do not acquiesce in any opinion of the Judge, they must take their course by bill of exceptions.

"We are not yet thro. the Bank Question. Martin has been *talking* 3 ds—Pinkney replies to-morrow, & that finishes. I set out for home next day."

We have followed the italics of Webster.

The opinions of the judges of the federal Supreme Court in *Trustees v. Woodward* were first reported by Farrar, who put them in type in the summer of 1819, not long after the final disposition of the causes in the circuit court by Story.

The proposition quoted is, in effect, that it was self-evident that the charter was a contract. Marshall apparently treats the remainder of the paragraph as conclusive evidence of the truth of this proposition. If so, its terms, "so general and so specious," could hardly have been better calculated to confuse and mislead.

The internal evidence afforded by the charter itself shows that, though the substance may have been furnished by Wheelock, its legal verbiage and framework were the work of lawyers; and, were it otherwise, history would bring us to the same conclusion, for we know who did it. These terms must be presumed to have been used in the sense in which they were used by skilled lawyers of that day.

The paragraph quoted is manifestly an inference drawn by Marshall from the recitals in the charter and the finding

in the special verdict, that the trustees accepted and assented to the letters patent; that the college corporation was duly organized; and that, "immediately after its erection and organization as aforesaid, the said corporation had, took, acquired, and received, by gift, donation, devise, and otherwise, lands, goods, chattels, and monies of great value," etc.

Marshall says "an application" was "made to the crown." In this he follows Webster's brief instead of the language of the preamble to the charter itself. If at all, this was true only in a specially narrow and exceptional sense. No application was, in fact, made to the king, nor did he, in fact, grant the charter, nor did he know of either; and the same is true of the home office. An application, in its normal legal sense, is a petition in writing, and it is quite apparent from the context that Marshall used the term in this sense.

If, by a fiction of law, Governor Wentworth could be treated as the crown, it is equally clear that no such application was made to him.

After Wheelock had ascertained, through Cleveland, that the governor would grant the charter, etc., like a sensible client he put his papers, etc., into the hands of his counsel, and instructed them to put in form, not an "application" for a charter, but a draught of a charter itself. They did so. This draught, which was placed by Wheelock in the hands of Governor Wentworth, neither was, nor assumed to be, a charter of a college. Wentworth, under the advice of his counsel, amended the charter in important particulars, and, thus amended, he issued it under the great seal of the province. Webster and Marshall substituted for the word "represented," which is used in the preamble, the word "application." No one can read the charter without appreciating the marked difference in the meaning of these terms. Marshall says the application was "for a charter to incorporate a literary and religious institution." Few would gather what the truth was from the seemingly studied ambiguity of this phrase. The representation referred to is incorporated in the preamble in these words: "And the said Wheelock

has further represented a necessity of a legal incorporation in order to the safety and well-being of said seminary, and its being capable of the tenure and disposal of lands and bequests for the use of the same." The representations set forth in the preamble, and which precede the one we have quoted, remove every possibility of doubt as to what was intended by the term "seminary." They refer, with the utmost distinctness, not to what, in fact, had no existence, but to Moor's Indian Charity School, which had existed for years. Marshall's statement confounds the two, makes them one, and treats them as identical.

We have shown in previous papers—and might at far greater length—by the action of the trustees of the college at their first meeting under the charter; by the emphatic declarations and the life-long conduct of the elder Wheelock in relation to the separation of the funds, and otherwise; by the early legislation in relation to Moor's Charity School, which has gone unquestioned to this day; and by the conduct of the second Wheelock and his successors until 1846, when the Charity School expired, that this attempted confounding of the two was directly in the teeth of the plans, purposes, and intentions, not only of those who procured the charter, but of those to whom it was secured.

Marshall next says: "In the application it is stated that large contributions have been made for the object which will be conferred on the corporation as soon as it shall be created."

It is clear—though Webster had too much sagacity and circumspection to put it in that peculiar form—that he here again refers to the representations made in the preamble.

It is impossible, in an article of this nature, to set forth each gift, donation, subscription, and grant in detail, with the circumstances attending it, and we shall not attempt it.

The representations in the preamble are :

1. That Dr. Wheelock, on or about 1754, in Connecticut, "at his own expense, on his own estate and plantation, set on foot an Indian Charity School;" that he, "for several years, through the assistance of well-disposed persons in

America, clothed, maintained, and educated a number of the children of the Indian natives, with a view to their carrying the gospel in their own language, and spreading the knowledge of the Great Redeemer, among their savage tribes, and hath actually employed a number of them as missionaries and school-masters in the wilderness for that purpose;" "that the design became reputable among the Indians, insomuch that a larger number desired the education of their children in said *school*, and were also disposed to receive missionaries and school-masters in the wilderness, more than could be supported by the charitable contributions in these American colonies;" that "Wheelock thought it expedient that endeavors should be used to raise contributions from well-disposed persons in England for the carrying on and extending said undertaking," and sent Whitaker and Occom to England "for that purpose;" that, to enable Whitaker the more successfully to perform his work, Wheelock gave him a full power of attorney, by which Whitaker solicited the Earl of Dartmouth and eight other "contributors to the charity" "to receive the several sums of money which should be contributed to such charity, which they cheerfully agreed to do;" that these nine were duly appointed "trustees of the money which had then been contributed, and which should, by his means, be contributed for said purpose;" that the trustees had "accepted" this "trust" "under their hands and seals," and that the same had been duly "ratified by a deed of trust" duly executed by Wheelock. The purpose of Wheelock in this is perfectly obvious. He desired to raise funds in Great Britain to build up his school in Connecticut. He knew that he was unknown to the mass of those who would naturally be disposed to favor his design, and that they would be likely to contribute much more freely if they knew that their funds were to be placed in the hands of some of the most eminent men in the kingdom as trustees, who would keep the expenditures within the scope of the trust. £9,494 7s. 7 1-2d. were thus raised in England, and placed in the hands of these trustees. This, with the Scotch fund—likewise a trust fund—made about £12,000. In those

days this was a large sum to be applied for such a purpose in the primitive regions of the new world. Not a penny of this sum was contributed for a college, or any other purpose, in New Hampshire. Wheelock had bestowed funds of his own upon his Connecticut school. He was not the owner of this £12,000 in his own right. At best he was not the owner in any sense other than any trustee is the owner of trust funds conveyed to him by a trust deed for a specified purpose. The English funds were collected and paid into the hands of these trustees, and held by them under a deed of trust. This was confirmed by Wheelock by his deed. These funds could in no sense be considered the funds of Wheelock; and the same is, in general, true of the Scotch fund. The trustees had no authority to expend these funds in building a college in New Hampshire; and their agent Dr. Wheelock had less, if such a thing is possible. The stream could not rise higher than the fountain. But, as we have seen, the trustees knew nothing about the incorporation of the college; they were not consulted about it; it was done behind their backs; and when they ascertained the fact they were exceedingly indignant about it, and regarded it as an attempt to pervert the trust and annihilate their powers. To do Wheelock justice, he did not claim that these funds could be used for college purposes; he conceded that they could not; he erected the first buildings with charity school funds, etc.; but he justified this expenditure distinctly upon the ground that it was made, not for the college, but for the charity school for which the funds were contributed. The implication from Marshall's statement and the facts would seem to be that the governor of the province had the lawful authority to take from the trustees the funds committed to their keeping, and thereon lay the foundation of another institution which none of the donors had in mind when they made their contributions, and that such taking was protected by the obligation clause. There is no such blemish from Wheelock's stand-point that the school and college were distinct.

It is sufficiently obvious that these contributions were not

made "for the object" of establishing Dartmouth College, or that these funds were to "be conferred" on that "corporation as soon as it shall be created."

2. That Wheelock had "given full power to said trustees to fix upon and determine the place of said *school* most subservient to the great end in view; and, to enable them understandingly to give the preference, the said Wheelock has laid before the said trustees the *several offers which have been generously made in the several governments in America*, to encourage and invite the settlement of said *school* among them for their own private Emolument and the increase of learning in their respective places, as well as for the furtherance of the general design in view;" "that a large number of the proprietors of lands in the western part of this our Province of New Hampshire, animated and excited thereto by the generous example of his Excellency, their Governor, and by the liberal contributions of many noblemen and gentlemen in England, and especially by the consideration that such a situation would be as convenient as any for carrying on the great design among the Indians; and also considering that, without the least impediment to the said design, the same school may be enlarged and improved to promote learning among the English, and be a means to supply a great number of churches and congregations, which are likely soon to be formed in that new country, with a learned and orthodox ministry, they, the said proprietors, have promised large tracts of land for the uses aforesaid, provided the *school* shall be settled in the western part of our said Province;" that the trustees had "given the preference to the western part of our said Province, lying on the Connecticut river, as a situation most convenient for said *school*." Then follow the representations in relation to a charter, which we have already quoted. The preamble then sets forth that Wheelock had represented that, in the infancy of the institution, the gentlemen nominated by him in his last will as "trustees in America should be of the corporation now proposed;" "that also, as there are already large collections for said *school* in the hands of the aforesaid gentlemen of the trust in Eng-

land," etc., "said Wheelock desires that the trustees aforesaid may be vested with all that power therein which can consist with their distance from the same."

Few things are clearer than that all this refers to the charity school and the trust funds collected for it.

Wheelock, in one of his Narratives, in assigning the reasons for committing the re-location of the school to this board of trust, says: "The determination of the site of this *school* now appeared to be an affair so public and so important, and that in which so many gentlemen of character were now interested, and, therefore, so delicate, that I could not think it prudent to attempt it myself, but to refer it wholly to the decision and determination of the honorable trust in England, who had condescended to patronize the institution by becoming *surety* to the generous donors for the *due application* of the monies collected in South Britain *for the only use and benefit of it.*" We have already adverted to the pointed terms in which a variety of donations and conveyances were made, or promised, to the school, as well as those of the subscriptions of 1755.

Marshall says: "The charter is granted, and on its faith the property is conveyed." A few pages further on he says: "From this brief review of the most essential parts of the charter it is apparent that the funds of the college consisted entirely of private donations. It is, perhaps, not very important who were the donors. The probability is that the Earl of Dartmouth and the other trustees in England were, in fact, the largest contributors."

The only inference to be drawn from the language of the chief justice is that Wentworth or the crown promised to grant a charter, not for the charity school, but for the college, and that upon the faith of this promise all the "funds" to which we have referred were raised for the college, and were given and conveyed to it as soon as it was chartered.

This subtle statement evades the question of royal foundation, on the one hand, as Story's definition of a public corporation did upon the other. As we have already seen, Wentworth, acting for the crown, made the promise of the

Landaff grant at the same time he promised to grant the charter. The promise was in terms made "to the use of the school," and the school was to have "the quit-rents" "free."

Whether the distinctive character and legal efficacy of a royal grant can be drowned out because other gifts were made by individuals, and the grant itself transformed thereby into "private donations," is at least questionable. This fundamental error embraced in Marshall's statement is repeated in a great variety of forms, and pervades the entire opinion. As we have already shown, this proposition is contrary to the facts, and unwarranted by the findings in the special verdict.

But Judge Farrar, who knew the facts, was too discreet and sensible, and withal too honest, a man to attempt to incorporate such a statement in that verdict; and it is safe to say that, if he had, no such case would ever have reached Marshall's court at Washington, for a glance at their arguments is sufficient to show that neither Bartlett nor even Sullivan would ever have consented to such a glaring perversion.

The conjecture in relation to the Earl of Dartmouth is but little nearer the truth than this opinion based upon the assumption. Whether we say, with Webster, that "the recitals in the charter were conclusive," or, with Story, that there is not the "least contradiction" between the "new facts and the recitals," we arrive at the same conclusion that these "funds" were the funds of the school, and not of the college.

Upon his assumption—having decided in less than two lines, without reference to any authority whatever, that this charter was a contract—he concedes, in the next paragraph, that the question before the court was not whether it was a contract, but whether it was a contract in a *constitutional sense*.

We have already noted some of the changes in the drift since the opinion in *Fletcher v. Peck*. In that case Marshall based the vital portion of his argument in relation to contracts upon the definition of a grant quoted from Black-

tone, and referred to in our third paper. In his opinion in the college case he makes no allusion to that or any other definition or authority upon that point. Indeed, he does not assume to base it upon authority. He simply refers twice to Blackstone upon a point not decided, and, in summing up on another point, says: "This opinion appears to us to be equally supported by reason and by the former decisions of this court." In *Fletcher v. Peck*, Marshall put his decision, so far as the "obligation" clause is concerned, upon the ground that it covered both executory and executed contracts, because "they [the words] are general, and are applicable to contracts of every description."

In *Ogden v. Saunders*, Webster simply reëchoes this when he says: "The words are general. The states can pass no law impairing contracts—that is, *any* contract." As we have seen, Marshall, in *Trustees v. Woodward*, found himself compelled to impose important limitations, and to concede that there were many not protected by the constitution.

We have seen that the author of the obligation clause regarded all our constitutions and laws as contracts in a general sense. If they were contracts in a constitutional sense, no law or constitution could be altered or amended unless that power was reserved therein. Webster, in one of his most important arguments, brought Marshall and his court face to face with the fact that none of the constitutions of the original thirteen states, save that of New Hampshire, contained any provisions for their amendment.

To avoid the effect of this argument, Marshall, in *Trustees v. Woodward*, says: "On the first point it has been argued that the word 'contract,' in its broadest sense, would comprehend the political relations between the government and its citizens; would extend to offices held within a state for state purposes, and to many of those laws concerning civil institutions which must change with circumstances, and be modified by ordinary legislation, which deeply concern the publick, and which, to preserve good government, the publick judgment must controul. That even marriage is a con-

tract, and its obligations are affected by the laws respecting divorces. That the clause in the constitution, if construed in its greatest latitude, would prohibit these laws. Taken in its broad, unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a state; would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. That as the framers of the constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term '*contract*' must be understood in a more limited sense. That it must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt, and to restrain the legislature in future from violating the right to property. That anterior to the formation of the constitution a course of legislation had prevailed in many, if not in all, of the states, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief, by restraining the power which produced it, the state legislatures were forbidden 'to pass any law impairing the obligation of contracts'—that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that since the clause in the constitution must, in construction, receive some limitation, it may be confined, and ought to be confined, to cases of this description; to cases within the mischief it was intended to remedy.

"The general correctness of these observations cannot be controverted. That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the constitution never has been understood to embrace other contracts *than those which*

respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces."

The short of all this is that the term "contracts" is used in the constitution, not in a general, but in a limited sense; that that instrument is to be read as though the word *pecuniary*, or some essentially equivalent word or phrase, was written in before the word "contracts." And *Ogden v. Saunders* substantially incorporates the word *retrospective* before the word "pecuniary."

The term contracts, in its normal sense, refers to executory contracts. We have already referred, at length, to Dr. Hammond's edition of Sandars' Justinian, and other authorities, on this point. Mr. Austin, notwithstanding his faults, had a clear knowledge of the civil law. He says: "In the proper sense of the word, a Contract is a *promise*, and begets only *jus ad rem* against the promisor; *i. e.*, a right to an act, an endurance, or a forbearance on his part." * * * "Obligation regards the future. An obligation to a past act, or an obligation to a past forbearance, is a contradiction in terms." * * * "In the language of the Roman law '*contract*' denoted originally a *convention which may be enforced by action*." * * * "In the language of the English law '*contract*' is a time of uncertain extension. Used loosely, it is equivalent to '*convention*' or '*agreement*.' Taken in the largest signification which can be given to it correctly, it denotes a convention or agreement which the courts of justice will enforce. That is to say, it bears the meaning which was attached to it originally by the Roman Jurisconsults." * * * "The confusion of *contract* and *conveyance* by elliptical or improper expression is one of the greatest obstacles in the way of the student." * * * "I shall distinguish contracts, properly so called, from certain facts or events which are styled contracts, but which virtually are alienations or conveyances." * * * "Rights *in rem* sometimes arise from an instrument which is called a contract, and are therefore said to arise from a contract: the instru-

ment in these cases wears a double aspect, or has a twofold effect; to one purpose it gives *jus in personam* and is a contract, to another purpose it gives *jus in rem* and is a conveyance. Where a so-called contract passes an estate, or, in the language of the modern civilians, a right *in rem*, to the obligor, it is to that extent not a contract, but a *conveyance*, although it may be a contract to some other extent, and considered from some other aspect. A contract is not distinguished from a conveyance by the mere consent of parties, for that consent is evidently necessary in a conveyance as well as in a contract."

It seems to us from the debates in the convention, the views of Judge Wilson, and those of other eminent authorities to which we have referred, that the framers of the constitution had this meaning in mind when they adopted the provision. An interpretation which would restrict the provision to executory contracts would be much more natural and reasonable than the other. A comparison of the passages quoted with those from Story, to which we have already adverted, shows how Marshall shrank from the logical consequences of his position and reasoning.

Prior to the adoption of the constitution of 1784, in New Hampshire, decrees for divorce, etc., had always been granted by the legislature. That constitution provided that "ALL causes of marriage, divorce, and alimony, and all appeals from the respective judges of probate, shall be heard and tried by the superior court until the legislature shall, by law, make other provision."

The natural inference would seem to be that such decrees, taking into consideration the then existing law as to property rights of men and their wives, might affect "contracts" "which respect property or some object of value," etc.

Marshall further says: "The case being within the *words* of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception." Placing these passages

beside those already quoted, but one construction can be put upon them. His canon of constitutional interpretation was that the term "contracts" was used in a limited, and not in a general, sense; but, presumptively, was used in a general, and not in a limited, sense until the contrary was shown.

We have already commented on his practical test, that those who claim that a given case does not come within the limited sense of the term must show that, if such case had been brought to the attention of the fathers, they would have "varied" "the language" "so" "as to exclude it, or it would have been made a special exception." A grave question of constitutional law reduced to a question of fact, and that decided upon conjecture!

One year after the decision in *Trustees v. Woodward*, Marshall delivered the opinion of the court in *Owings v. Speed* (5 Wheat. 420). The case was simple enough. In 1785 Virginia issued a patent to Bard and Owings for one thousand acres of land in Bardstown. In 1788 the legislature of Virginia passed an act vesting one hundred acres of this tract "in trustees, to be laid off in lots, some of them to be given to settlers, and others to be sold for the benefit of the proprietors." The vital question was whether this act impaired the obligation of contracts. It was held that it did not.

Marshall, in *Trustees v. Woodward*, says: "According to the theory of the British constitution, their Parliament is omnipotent. To annul corporate rights might give a shock to public opinion which that government has chosen to avoid; but its power is not questioned. Had Parliament immediately after the emanation of this charter, and the execution of those conveyances which followed it, annulled the instrument, so that the living donors would have witnessed the disappointment of their hopes, the perfidy of the transaction would have been universally acknowledged. Yet then as now, the donors would have had no interest in the property; then as now, those who might be students would have had no rights to be violated; then as now, it might be said that the trustees, in whom the rights of all



were combined, possessed no private, individual, **beneficial** interest in the property confided to their protection. *the contract would at that time have been deemed sacred by all. What has since occurred to strip it of its inviolability? Circumstances have not changed it. In reason, in justice, and law it is now what it was in 1769.*" * * *

"By the revolution the duties, as well as the powers, government devolved on the people of New Hampshire. *It is admitted that among the latter was comprehended the transcendent power of Parliament, as well as that of the executive department. It is too clear to require the support of argument that all contracts and rights respecting property remained unchanged by the revolution. The obligations then, which were created by the charter of Dartmouth College, were the same as the new that they had been in the old government. The powers of the government was also the same. A repeal of this charter at any time prior to the adoption of the present constitution of the United States would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restrictions upon the legislature to be found in the constitution of the state. But the constitution of the United States has imposed this additional limitation: that the legislature of a state shall pass no act 'impairing the obligation of contracts.'*"

It is clear from this that at some time after the Revolution the legislature of New Hampshire had the power to pass the acts in question or to annul this charter. When and how was it lost?

Whether or not Marshall, with the rest of the people of Virginia, lived for more than half a century under a constitution which discarded what he, in *Fletcher v. Peck*, termed the "general principles which are common to our free institutions," we have no occasion to enquire.

We are not aware of any difference in the moral quality of robbing a man of his real estate, whether done by the Virginia or any other legislature. The act, the constitutionality of which was in question in *Owings v. Speed*, took the land of A from him and vested it in B. The acts of the

legislature of New Hampshire, the constitutionality of which was brought in review in *Trustees v. Woodward*, ousted no trustees, and took away none of *their* property. They were left as they stood before, but others were added to their number. We are unable to see any greater "perfidy" in his act than there was in the act of the Virginia legislature, which despoiled the owners of their real estate, and of all right, title, and interest therein.

Precisely what is meant by the passages last quoted from Marshall's opinion in *Trustees v. Woodward*, taken together, is not in all respects clear. Some of the propositions, it seems to us, are in flat contradiction of each other. Apparently they can only be reconciled upon the assumption that Marshall intended to adopt in fact, while avoiding it in name, the first proposition of Mason at Exeter—afterwards enforced by Webster at Washington—that, laying the state and federal constitutions out of the case, the acts in question were void because judicial, and not legislative, in their nature. If this were so, we are unable to see how a reservation in a charter, that it might be altered, amended, or repealed, at pleasure, could change the nature of the power, transform what was in essence judicial into that which was legislative, and thereby, in effect, confer upon Congress and the state legislatures judicial powers which the respective constitutions have denied to them.

The distinction suggested is not warranted by any of the later decisions of the Supreme Court, ending with the so-called Granger cases.

In the turntable *Legal Tender* cases the majority of the federal Supreme Court first held that Congress had no general power, under the constitution, to pass a law "impairing the obligation of contracts;" but afterwards the minority, now transformed into a majority, held that Congress had the power. It seems never to have occurred to any of the judges that this power was judicial, and not legislative, and the same is true of the subsequent decisions upon the effect of the reservation clause.

The superstructure falls with the foundation. Wherever

the power exists—and the principle is the same whether the reservation is written in or implied—the exercise of that power is everywhere deemed an act of legislation.

If we assume that a charter is not a contract, the power to alter, amend, or repeal—it being legislative—must, as a fundamental principle of British law, be deemed, by implication, to exist in every charter. This charter, then, in legal effect, was precisely what it would have been had the reservation clause been written in. If the charter was a contract, the same result follows from the principles underlying the decision in *Ogden v. Saunders*. Parliament, then, as an act of legislation, had the power to alter, amend, or repeal the charter at pleasure, and the people of New Hampshire had the same right after the Revolution, unless they had divested themselves of that power by the state or federal constitution. The decision of the state court was conclusive in this action that the state constitution had no such effect. The only remaining question then was whether the federal constitution, by the obligation clause, had blotted out this integral part of the charter or contract.

If, as Marshall says, the charter was a contract, and “circumstances have not changed it,” and, “in reason, in justice, and in law, it is now what it was in 1769,” it is simply impossible that the federal constitution should annul such an important provision in the contract.

It would, indeed, be singular if a provision of the constitution, adopted for the very purpose of preventing interference with contracts, should subvert the purpose of its originators by striking out, in effect, a vital part of them.

Those who believe that charters are not contracts in the sense of the constitution, or that the purpose of its framers was inconsistent with the retention of the reserved power, look at the question from a different stand-point. A pointed illustration of the latter view may be found in the effect of the adoption of the constitution on the following provision of the charter: “And we do further will, ordain, and direct that the President, Trustees, Professors, Tutors, and all such officers as shall be appointed, for the *publick instruction and*

government of said college, shall, before they undertake the execution of their offices or trusts, or within one year after, take the oaths and subscribe the declaration provided by an act of Parliament, made in the first year of King George the First, entitled 'An act for the further security of his Majesty's person and government, and the succession of the crown in the heirs of the late princess Sophia, being protestants, and for the extinguishing the hopes of the pretended Prince of Wales, and his open and secret abettors—that is to say, the President before the Governor of our said Province for the time being, or by one by him empowered to that service, or by the President of our said Council, and the Trustees, Professors, Tutors, and other officers, before the President of said College for the time being, who is hereby empowered to administer the same; an entry of all which shall be made in the records of said College."

The legislature of New Hampshire, by the act of June 27, 1816—one of the acts complained of—attempted to abrogate this oath of allegiance to the British king, and to substitute another for it. The seventh section of that act provided: "That the president and professors of the university, before entering upon the duties of their offices, shall take the oath to support the constitution of the United States and of this state, certificates of which shall be in the office of the secretary of this state within sixty days from their entering on their offices respectively."

This is one of the acts set aside by Marshall in this case as unconstitutional.

The chief justice, in his opinion, makes no allusion to the oath of allegiance required by the charter, though the broad terms used by him would seem to cover it. If the charter was in 1816–19 precisely what it was in 1769, "in law," the officers were still bound to take the oath of allegiance to the British crown. It is hardly possible, however, that Marshall could have meant this. The oath required was inconsistent with the constitution, and, therefore, by implication, was annulled by it. Did the power to alter, amend,

and repeal occupy essentially the same position? and was that also annulled?

Marshall lays some stress upon the term "forever," etc. These are merely formal words, like those, common alike in all instruments of this character, both where the power is expressly reserved and where it is not. It might as well be argued that the words, "of our special grace," "mere motion," etc., made the grant a "gratuity," and thus put it beyond the protection of the obligation clause. They can no more annul the power where it is a part of the contract or charter, by implication, than where it is expressed.

We have previously shown that the distinction between public and private corporations, in the sense in which those terms were used by Story and his compeers, was unknown before the decision in *Trustees v. Woodward*. We have already stated the definition of public and private corporations which, Story says, was sanctioned by the court in this case. Under that definition a bank, whose stock "was owned partly by private persons and partly by the government," was a private corporation.

McCulloch v. Maryland was decided in 1820, and *Osborn v. The Bank* in 1824. These cases hold that the bank of the United States was "a public corporation created for public and national purposes."

The first United States bank was incorporated with a capital of \$10,000,000, and the second with a capital of \$35,000,000. The "government," under the first charter, was allowed to hold \$2,000,000, and under the second, \$7,000,000 of the stock. That Story and Marshall had, as they were wont to do, decided the vital question raised by these cases years before it came before them judicially, is well known. The court treated the United States bank as one of the "instrumentalities of the government," and so might a state bank be treated as one of the instrumentalities of a state government. The distinction taken was, to say the least, convenient. But, in our examination of the history of these opinions in relation to the distinction

between public and private corporations, we have been often forcibly reminded of what a snowy-haired chief justice—one of a family eminent for its scholars and jurists, and standing high on the roll of judicial fame, both in state and nation—once said to us about the mass of opinions upon constitutional questions: “They are filled with ingenious reasoning, ingeniously stated, for the purpose of enabling the court to reach a conclusion at which it wishes to arrive.”

The Granger cases mark an era in the judicial history of the Union.

The precise points actually decided in these cases are of little importance, as compared with the significance of the reasoning on which they rest and the consequences which must flow from them in the future.

They show that the domination of the East in the Supreme Court, as well as in other departments of the government, has become a matter of history, and that the great West and Southwest hold the future destinies of the country. Eastern people are proverbially slow about some things. They learn slowly what they do not wish to know. Any other people would have appreciated at once the significance of late decisions of the Supreme Court, in a class of municipal bond-tax cases, to the effect that the judgments of the whole retinue of federal courts, with the Supreme Court at their head, in causes in which they had jurisdiction, were not binding, but merely advisory to a meeting of municipal voters, and that the last was practically the tribunal of *dernier resort*.

If the Supreme Court erred in the Granger cases, they did so having all the light that could be thrown upon the subject by the ablest men in the profession, for before them were the opinions and arguments of Benjamin R. Curtis, William M. Evarts, E. Rockwood Hoar, Matt. H. Carpenter, Judge Lawrence, Judge Dixon, the Sloans, Mr. Cook, Mr. Stoughton, Mr. Carey, Judge Ryan, and others.

In these cases Chief Justice Waite, speaking for the court, nominally recognizes the authority of *Trustees v. Woodward*. Chief Justice Taney tacitly did the same in *Charles River*

Bridge v. Warren Bridge; but no lawyer ever doubted that Justice Grier—speaking for himself—Mr. Justice Field, and Chief Justice Chase reaffirmed the opinion of Taney, when he said, in his opinion in the Binghampton Bridge case: “But, assuming a power for one legislature to restrain the power of future legislatures, those who assert that it has been exercised should prove their assertion *beyond a doubt*. Such intention must be clearly expressed in the letter of the statute, and not left to be discovered by astute construction and inferences. Although an act of incorporation may be *called* a contract, the rules of construction applied to it *are admitted to be the reverse* of those applied to other contracts.” If there were still room for doubt, the opinion in the third of Otto would seem to annihilate it.

The opinion of Taney in the Bridge case was, as Story felt, a great departure from the principles underlying the opinion of Marshall in Fletcher v. Peck and in the College case.

The opinion in Munn v. The People is, in effect, a far greater one. This decision is not put upon the ground that the owners of the elevators, as private individuals, stand as they would if, in the same capacity, they had owned the Suspension Bridge—the connecting link between two great public thoroughfares.

That artificial,—in the respects now under discussion—have at most no greater rights than natural, persons, is one of the principles underlying this decision.

If the court can look at the facts in the case of private individuals—take judicial notice of them—in order to determine whether any “employment” or “business” has been “clothed with a public interest,” it can do so in the case of corporations. If they could do it in Munn v. The People they could in Trustees v. Woodward.

What were the purposes for which Dartmouth College was incorporated, and what were the facts? The charter thus sets forth the purposes: “KNOW YE THEREFORE, That We, considering the premises, and being willing to encourage the laudable and charitable design of spreading Chris-

tian knowledge among the savages of our American wilderness, and also that the best means of education be established in our Province of New Hampshire, for the benefit of said Province, do * * * will, ordain, grant, and constitute that there be a College erected in our said Province of New Hampshire, by the name of DARTMOUTH COLLEGE, for the education and instruction of youth of the Indian tribes in this land in reading, writing, and all parts of learning which shall appear necessary and expedient for civilizing and christianizing children of pagans, as well as in all liberal arts and sciences, and also of English youth and any others."

The doors of the college have been open for more than a hundred years to all who sought its facilities. The college prescribed the terms on which they were admitted, fixed the compensation, and gave notice thereof to the world. Its graduates have gone forth by thousands to take their places in all the professions and walks of life; the artificial power acquired by them there has been so much capital; the influence of the institution has been felt in every department and throughout the Union. In view of these facts well might Chief Justice Richardson say in this cause as he did (1 N. H. 119): "These great purposes are surely, if anything can be, matters of public concern." Judge Marshall goes further. He says: "The particular interests of New Hampshire never entered into the mind of the donors, never constituted a motive for their donation. The propagation of the Christian religion among the savages, and the dissemination of useful knowledge among the youth of the country, were the avowed and sole objects of their contributions. In these New Hampshire would participate; but nothing particular or exclusive was intended for her. Even the site of the college was selected, not for the sake of New Hampshire, but because it was 'most subservient to the great ends in view,' and because liberal donations of land were offered by the proprietors on condition that the institution should be there established. The real advantages from the location of the college are, perhaps, not less con-

siderable to those on the west than to those on the east side of Connecticut river. The clause which constitutes the incorporation and expresses the objects for which it was made declares those objects to be the instruction of the Indians, 'and also of English youth and any others.' So that the objects of the contributors and the incorporating act were the same—the promotion of Christianity and of education generally; not the interests of New Hampshire particularly."

The college was located on the borders of two states: on the banks of what was, to some extent, a natural highway, and where, at the time of its location, it was supposed that the great artificial lines of travel would converge, and where it was hoped would be located the future capital of a state.

The elevators were located at Chicago, which partially, in consequence of natural facilities, but to a far greater extent in consequence of artificial ones, has become a great focal point for the reception and transhipment of grain. The doors of these warehouses have been open for the transaction of this business, in its present form, only about twenty years.

The college has received students and sent forth educated men with their diplomas; the warehouses have received grain and issued it under certificates of deposit. The college takes toll in the nature of pay for services rendered; so do the warehouses. If "avoirdupois" is to be the test, the warehouses have the advantage; if brain sweat is to be the test, the college leads.

The use in one case is public; how can any man say it is not so in the other? It seems to us that Chief Justice Waite but reëchoes the proposition of Lord Hardwicke, enforced by Sullivan in his argument. He says: "Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. *When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to*

be controlled by the public, for the common good, to the extent of the interest he has thus created." * * * "But we need not go further. Enough has already been said to show that when private property is devoted to a public use it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle. *For this purpose we accept, as true, the statements of fact contained in the elaborate brief* of one of the counsel of the plaintiffs in error." The brief referred to summarized the magnitude of the warehouse business at Chicago.

These principles are far-reaching in their consequences. As applied to corporations, in the absence of a positive prohibition, the nature of the business or employment "as public," or as affecting public interests, enters into and permeates the charter, leavens the lump, and, in effect, transforms it into what, since *Trustees v. Woodward*, is commonly termed a public corporation. As we have already shown, the ablest courts and jurists have differed widely as to the extent of the power which legislative bodies may exercise over such corporations. We have before suggested what we regard as the true rule.

To carry out the principles laid down by them, it seems to us that the Supreme Court must hold that legislatures may, in general, authorize the taking of the private property of individuals (with compensation) for grain elevators, hack-stands, baker's ovens, and whatever else the court may regard as "public" employments. The test of a public use seems to be what is beneficial to the public, or what legislative bodies may deem advantageous to many people.

The constitution imposes a restraint upon the exercise of this power. What the real or constructive public may take in this way they must pay for.

But what is termed the power of "regulation" is far more important than that of eminent domain, and especially when applied to corporations.

Whenever the nature of the employment or business enters into a charter the power of regulation goes with it.

So far as the court has yet gone, the real or constructive public may not take the property itself without paying for it; but under the guise of "regulation" this public may take the beneficial use of it by paying a nominal price, such as the public, through its legislative bodies, see fit to say is reasonable.

The Supreme Court may, for the time being, hesitate and fluctuate as in the South Ottawa Bond cases, but these rules must govern until it, as it has already done in relation to admiralty jurisdiction, turns its eye to the pole-star of legal truth, and, in spite of adverse winds and baffling currents, sails out into deep water and ignores the pernicious principles supposed to have been established in *Trustees v. Woodward*.

II. OF THE JURISDICTION OF EQUITY TO EN- JOIN CORPORATE ELECTIONS.

The legal profession in this country have become so accustomed of late to the interference of courts of equity with the management and mismanagement of the affairs of private corporations, that they have come to regard such interference as a necessary incident to the proper administration of justice, and to treat the jurisdiction of equity, as now exercised in this class of cases, as part of the ancient and well-defined jurisdiction of the High Court of Chancery. In reality the law upon this subject is of modern growth. Anciently the English Chancery exercised but little control over private corporations beyond the visitatorial functions which had been exercised by the lord chancellor from the earliest organization of his court as an independent judicial tribunal, rather than a mere appendage upon the sovereign and his council. And the English reports, prior to the beginning of the present century, afford but few instances of such interference. Indeed, during the first quarter of this century, comprising the greater period of Lord Eldon's long and illustrious chancellorship, while the reports indicate an increase in the number of applications for the extraordinary aid of equity in corporate affairs, such applications were yet extremely rare as compared with their frequency in later years.

The growth of equitable jurisdiction thus indicated is undoubtedly due to the enormous increase, in modern times, of the number of corporate associations organized for purposes of transportation, banking, insurance, manufacturing, and other kindred objects, and to the ready adaptation which courts of equity have always shown in moulding their reme-

dies to meet the exigencies of changing times and the multiplied complications of modern business affairs. The development of railway enterprises alone, within the past forty years, has of itself given rise to a vast body of decisions of the various courts of equity, in this country and in England, already worthy to be dignified as a separate and distinct branch of equity jurisprudence. It is to be hoped that some painstaking author of the future may extract from these decisions their underlying principles, and present them to the profession in a shape available for practical use.

It is only proposed, within the limits of the present article, to discuss the existing state of the law upon one branch of the general subject indicated, viz.: The power of a court of equity to interfere with elections of officers of private corporations. While the propriety of equitable interference in this class of cases has been sharply criticised, and with no inconsiderable show of justice, the jurisdiction itself is too firmly established to be readily shaken without the intervention of legislative authority. It is, however, almost entirely of American growth, the English authorities affording few, if any, instances of its exercise. The earliest reported decision upon the subject in this country is *Haight v. Day*, 1 Johns. Ch. 18, decided in 1814. The case was a bill by subscribers to the capital stock of the Catskill Bank, praying an injunction against the commissioners appointed to receive subscriptions and organize the corporation, to restrain them from proceeding to an election of officers. The bill alleged that the defendant commissioners had arbitrarily, and without complainants' consent, distributed a large number of shares of the capital stock among themselves, their relatives, and favorites, and that such apportionment was made in fraud of the rights of complainants. The charges of fraud and bad faith were fully negatived by the answer. The injunction granted upon the filing of the bill was dissolved upon motion and hearing. Chancellor Kent, without expressly deciding the question of the jurisdiction of equity to grant the preventive relief sought, seems to have tacitly recognized it as within the power of the court; and

It may, perhaps, be inferred from the language of his opinion that there were previous, though unreported, instances of the exercise of such power in New York. In dissolving the injunction the chancellor seems to have been governed chiefly by considerations of the extreme hardship which might result from its continuance, since the prevention of the election would, at that stage of the organization, operate as a dissolution of the body corporate; and, the charges of fraud and improper exercise of official discretion on the part of defendants being fully repelled by the answer, the court could not do otherwise than dissolve the injunction.

In *Walker v. Devereaux*, 4 Paige, 229, decided in 1833, we find an unmistakable and emphatic assertion of the power of a court of equity to control by injunction the election of corporate officers, upon grounds of fraud and irreparable injury, although, as in *Haight v. Day*, the relief was denied upon the case as presented. This was a bill by a shareholder of the *Utica & Schenectady Railway Company* against the commissioners appointed to receive subscriptions, to distribute the capital stock, and to complete the organization of the company, the bill praying an injunction to restrain defendants from proceeding to hold an election for directors. The bill in this case affords an instructive chapter in the history of the organization of corporate enterprises, since it foreshadows, even in those primitive days of railroad building, the devices to which experienced dry nurses, skilled in the accouchement of such enterprises, usually resort to promote the rapid growth of their infant nurslings. It alleged that the defendant commissioners had distributed shares of stock in an arbitrary and unjust manner, principally among their friends and relatives, and without reference to the rights of complainant and other subscribers; that defendants had apportioned one hundred shares of the stock to each of themselves, to the exclusion of complainant and other subscribers; that some of the commissioners were interested in stock subscribed by, or in the name of, other persons, under an agreement or understanding that it should be held for the benefit of the commissioners interested; that they had appor-

tioned stock to persons who had agreed to assign their shares to the commissioners, or to give them their proxies to vote at the election of directors; and, saddest of all official misdemeanors, that they had set apart a fund "to be distributed to state officers, for the reason that they were such, and a fund for certain editors of newspapers, whom it was thought advisable to conciliate!"

The injunction was refused upon several grounds; among others, because the principal allegations of the bill were made only upon information and belief; and because, also, the injunction, if granted, would seriously affect the rights of other shareholders not before the court, and who had had no opportunity of being heard. Upon the question of its jurisdiction, however, the court took pronounced ground. "This court," says Walworth, chancellor, "unquestionably has the power to prevent this election by an injunction operating upon the commissioners, restraining them from acting as inspectors of the election. And in a case of imperious necessity, where the complainant did not know and could not ascertain the names of the other stockholders, I might consider it my duty to prevent a great and irreparable injury to him, although the effect of that interference might be to destroy the charter of a corporation. But, in the exercise of such a power, the court should require ample security from the complainant to pay all damages other persons might sustain by the granting of the injunction, if it should be subsequently ascertained that it was not warranted by the real facts of the case. The oath of the complainant, that he is informed and believes the existence of a fact, may be a sufficient ground to authorize the issuing of an injunction against a defendant who has had an opportunity to deny the allegation if it is unfounded, but it is not sufficient to justify the court in destroying or injuring the rights of others who have not had any opportunity of being heard by themselves, or by those who are under a legal obligation to protect their rights." What circumstances would have presented such a case of "imperious necessity" as to warrant an injunction against a proposed election of corporate

cers, the learned chancellor does not state ; but, with his usual caution in the exercise of the extraordinary powers of a court of equity, he refused the injunction, contenting himself with asserting a jurisdiction which it was left to other judges to exercise.

Reed v. Jones, 6 Wis. 680, decided in 1857, affords another instance of judicial recognition of the power of equity to join in the class of cases under consideration, as well as a denial of the relief upon the circumstances of the case as presented. The bill or complaint was filed by a minority of the board of directors of the Manitowoc & Mississippi Railroad Company against the majority of the directors, charging them with having fraudulently conspired to obtain absolute control of the affairs of the company ; with having, by resolution, against the vote and protest of plaintiffs, fraudulently caused capital stock to be issued to a large amount, for the purpose of using the vote upon such stock for furthering their fraudulent designs at the election ; and with having, by another resolution, caused the subscription book of the company to be closed until after the election, in order to prevent *bona fide* subscriptions to the stock which might change the result of the election. It was also alleged that one of the defendant directors, Jones, intended to vote at the approaching election of officers upon an excess of stock wrongfully held by him, which he had received under an agreement with the company to convey to it certain lands, to a portion of which he had failed to make title, the company being entitled, under the agreement, to a surrender and return of shares of stock in proportion as Jones might fail to make title to the lands conveyed. An injunction was prayed restraining Jones from voting, and the company, its officers and agents, from receiving his vote, upon such excess of stock alleged to be wrongfully held by him. A preliminary injunction, in conformity with the prayer, having been granted by a court commissioner, was dissolved by the court below, and plaintiffs appealed from the order of dissolution. Here, as in Haight v. Day, both court and counsel seem

to have tacitly conceded the question of jurisdiction, the court, however, holding that the facts presented by the bill were not sufficient to warrant a preliminary injunction. Two grounds seem to have been principally relied upon by the supreme court in support of its decision: 1st, that the company had not taken any steps to declare the excess of stock void and to cancel it; and, 2d, that the plaintiffs had failed to show any irreparable injury as likely to result from the threatened vote upon such excess of stock. Upon these points the court, Mr. Justice Cole delivering the opinion, say: "Now, upon general principles it would seem improper and most mischievous to grant an injunction upon the complaint of a minority of a board of directors, to restrain a stockholder from voting upon an alleged excess of stock held by him, before the company had taken any steps to cancel the stock or declare it void. We have not been referred to any case where an interposition of the court by injunction has been exercised for such a purpose, and, after some research, we have been able to find none. But from the allegations of this complaint it is not easy to perceive how it would produce irreparable and permanent injury to the company, as plaintiffs, even if Jones should vote upon this alleged excess of stock. The complaint fails to show that imminent danger to the property of the plaintiffs is threatened by the contemplated acts; nor does it present any other sufficient ground or reason for arresting or restraining him from voting upon this stock." Accordingly the order of the court below, dissolving the injunction, was affirmed.

The cases thus far considered are cases where the power of a court of equity to enjoin the election of corporate officers is recognized, the relief being denied because no sufficient cause was shown for invoking the exercise of the extraordinary jurisdiction of the court. They are, therefore, instructive only in as far as regards the question of equitable jurisdiction, with the additional, though negative, value attaching to any decision of a respectable court denying specific equitable relief because of insufficient allegations in the bill.

Let us now examine, briefly, a class of decisions where the circumstances were deemed of such "imperious necessity" as to warrant a court of equity in interfering by injunction.

Hilles v. Parrish, 1 McCart. 380, decided in 1862, is a case in point. This was a bill by shareholders against the directors of a corporation organized in New Jersey, seeking to set aside a transfer of certain shares of capital stock of the company made by order of the defendant directors to themselves individually, and to restrain them from selling or transferring such shares, and from voting upon them at the next ensuing election of officers. The bill was filed three days before the election. An injunction was allowed *in limine* by the court below, restraining defendants from transferring the disputed shares, but refused in as far as it was sought to restrain them from voting upon such shares. As to the latter branch of the relief, the chancellor was of opinion that the effect of enjoining defendants from voting upon the disputed stock might be to change the result of the election and the consequent control of the affairs of the corporation, against the wishes of those holding the legal title to a majority of the shares, without an opportunity of being heard in defence of the charges made by the bill. For these reasons he refused to interfere *in limine* with the holding of the election. But upon the hearing of the cause it was held that, as the resolutions of the board of directors authorizing the transfer of the shares in question were passed at a meeting held by them beyond the borders of the state, they were void, and the transfer of stock made pursuant to such resolutions conferred no title, and that complainants, upon that ground, were entitled to the relief prayed. It was further held that, the defendant directors having transferred the shares to themselves without adequate consideration, and with the design of retaining themselves in office by controlling the elections, such transfer was, upon that ground, illegal and void, and that defendants should, therefore, be enjoined from voting upon the shares thus fraudulently transferred. And, in the opinion of the court, the acceptance by a shareholder of a dividend upon his stock would seem to be no such ratifica-

tion of the illegal action of the directors as to estop the shareholder from the equitable relief sought. The right to injunction in such a case was based by the court almost, not entirely, upon the element of fraud in the conduct of the directors in attempting, by an illegal transfer of corporate property to themselves, to control the election, and thereby to perpetuate themselves in office and practically disfranchise other shareholders. And the case is an instructive one, shedding light upon the element of fraud as a ground for equitable interference with the management of corporation. It is submitted, however, that equally strong ground for relief by injunction might be found in the element of breach of trust, plainly shown by the facts stated. Treating the directors as occupying a fiduciary relation towards the shareholders, and as *quasi* trustees under a trust partly expressed and partly implied—and there is strong authority for such a view—the case certainly presents a flagrant breach of trust, and upon that ground alone the propriety of the injunction might with confidence be based.

Campbell v. Poultney, 6 Gill & J. 94, decided in 1834, affords another instance of the exercise of that branch of the preventive jurisdiction of equity under discussion. The act of incorporation of the Union Bank of Maryland prescribed certain rules and limitations for voting upon shares of capital stock, fixing the number of votes which each shareholder might cast, in an ascending scale proportioned to the number of shares held by him, but providing that sixty votes should be the maximum to which any single shareholder should be entitled. The bill alleged that defendants had become the proprietors of a large number of shares, with the fraudulent intent of evading the provisions of the charter, and that, for the purpose of increasing the number of votes to which they were lawfully entitled, they had caused about two thousand shares, then pledged to the bank as security for advances made to defendants, to be transferred to divers unknown persons, without consideration and colorably, taking from such persons powers of attorney authorizing defendants to vote upon the stock so transferred. The

bill charged that such acts were a fraud upon the charter, and likely to result in the election of a board of directors not the choice of the legal voters. It prayed that defendants might be enjoined from voting upon such stock, and that the judges of election should be enjoined from receiving any vote which might be tendered under such powers of attorney held by defendants. A preliminary injunction was granted in conformity with the prayer of the bill, but was afterwards dissolved, and, an appeal being allowed from the order of dissolution, the record was brought before the court of appeals. This court reversed the order of the court below dissolving the injunction, and awarded an injunction to have the same effect as that originally granted. The opinion of the majority of the court is meagerly reported, the principal ground upon which the relief was based being that the facts stated constituted a violation of the principles and spirit of the charter, and that the designs of defendants, if carried into effect, would be a fraud upon complainants and in derogation of their chartered rights, for the protection of which an injunction was the appropriate remedy. Mr. Justice Archer dissented, basing his dissent upon the question of jurisdiction, and holding that the determination of the right of suffrage in corporate elections was purely a matter of legal cognizance, with which a court of equity had no concern. But he conceded that, if he could be satisfied of the jurisdiction of equity over such a case, he would have little difficulty in concluding that the facts alleged in the bill presented a case which, if carried into execution, would constitute a violation of the charter. But the question of jurisdiction, as has already been shown, is definitely established in favor of courts of equity, and no sufficient reason is discernible why the opinion of the court should not have been unanimous.

The views of the majority of the court in *Campbell v. Poultney* were approved and sustained in *Webb v. Ridgeley*, 38 Md. 364, decided in 1873. In this case the charter of the Baltimore & Liberty Turnpike Company provided that each shareholder should be entitled to one vote for each share

of stock held by him, not exceeding twenty in all. The bill charged that defendants had colorably, and without consideration, transferred certain shares of stock to divers persons named in the bill, with the fraudulent intent of evading this provision of the charter by increasing the number of votes which defendants could control. It prayed an injunction against the voting of such stock, in person or by any power of attorney from the fraudulent transferees, and prohibiting the judges of election from receiving any such votes, whether tendered in person or by proxy. The court below granted the relief as prayed, and the injunction was sustained on appeal. The appellate court adopt the reasoning of the majority of the judges in *Campbell v. Poultney*, and hold that the acts alleged and threatened constituted a violation of the spirit of the charter, and a consequent fraud upon the rights of complainants, to prevent which an injunction was the appropriate remedy. It was also held that the statute of Maryland, regulating the canvassing of votes at corporate elections, providing an oath to be administered to the elector by the judges of the election, and designating the form of oath to be taken by a person voting as proxy, as well as the mode of voting by proxy, did not afford such a remedy at law as to oust the jurisdiction of equity—such statutory regulations being merely safeguards to promote a fair election, and not affording in themselves a remedy at law in the technical sense of that term.

Brown v. Pacific Mail Steamship Company, 5 Blatchf. C. C. 525, decided in 1867, is an exceedingly instructive case, not only for its clear and emphatic assertion of the power of courts of equity to control elections of corporate officers, but for the exhibition which it presents of the mysterious devices to which the manipulators of corporate enterprises in the metropolis are prone to resort in furtherance of their schemes. The courts of New York, both state and federal, have given to the profession some startling novelties in the law of injunctions, but it may well be doubted whether such peculiar equities were ever brought to the notice of a court of justice as in the case under consideration. Complainants

occupied the relation of trustees, holding a large number of shares of Pacific Mail stock, under a written agreement defining the nature and duration of their trust and its conditions, the agreement also containing an irrevocable power of attorney, or proxy, authorizing complainants to vote upon the shares so held by them in trust. The bill alleged that certain of the defendants had been engaged in soliciting proxies for the purpose of voting upon shares of stock at an election for directors about to be held, and that, for this purpose, they had issued a circular charging complainants with unfaithful administration and a breach of their trust, all of which charges were alleged by the bill to be false. It further alleged that defendants had purchased a large number of shares of stock for the purpose of getting control of the company, and had bought, or arranged to control, a large number of proxies, so that, without corresponding beneficial interest in the shares which they represented, and without any choice by the persons really owning such shares, defendants were endeavoring to control the election. The bill alleged, further, that defendants, being still in a minority of votes, proposed doing certain things, viz.: 1. To obtain an *ex parte* injunction, restraining complainants from voting upon the shares held by them. 2. To obtain such injunction upon the pretence that complainants had improperly acquired, or were about to make improper use of, the shares held by them; or upon other inaccurate, ill-founded, or partial statements. 3. That such pretences would be erroneous, unjust, and wholly unfounded. 4. That the injunction would not be obtained, or, if obtained, would not be served, until immediately upon such election. 5. That the result would be to exclude complainants from voting upon the shares held by them, thus permitting a minority of shareholders to succeed in choosing a board of directors, against the wishes of a majority and of complainants. Such remarkable precision displayed by complainants in thus predicting, under oath, the proposed action of defendants, would seem little short of prescience, were it not for the further allegation in the bill that complainants' grounds of

apprehension of defendants' doing these things were, that they had done them before with reference to an election of directors of another company! Other allegations were made, pointing out the injury which, it was believed, would result from defendants' carrying out their proposed schemes. The only denial of the allegations of the bill offered, upon the hearing of the motion for an injunction, was a denial, by affidavit, of some of the defendants that they had bought proxies as alleged.

A distinguished array of counsel argued the motion upon either side. For complainants there appeared O'Connor, Tilden, Evarts, and Potter. For defendants there were Woodruff, Emott, Rapallo, and Vanderpoel. The court found little difficulty in reaching the conclusion that the remarkable allegations of the bill presented a case of such "imperious necessity" as to warrant the interposition of the extraordinary aid of equity. "If there ever was a case for relief of some kind by injunction," says Mr. Justice Blatchford, p. 531, *et seq.*, "this case is one of that kind, to prevent the commission of so great and admitted a wrong, wholly undefended. * * * The election, taking place under these circumstances—which it is thus admitted will be the circumstances of the case—would be perfectly legal, although accomplished in this way by a minority of the votes. There would be no ground, so far as I am able to perceive, for setting aside the election because an injunction, obtained from a proper court having jurisdiction, had excluded certain persons from voting. * * * And this case presents a case eminently of equity jurisdiction—a case of irreparable injury to the plaintiffs, and a case where no such injury can be produced to the defendants. Indeed, under an averment of the bill that these transactions of the defendants will produce great injury to the interests of the stockholders, and the admission or absence of denial of such averment, it is clear that there can be no injury to the proper interests of such of the defendants as are existing shareholders in the Pacific Mail Company by granting an injunction; whereas it is manifest, from the statements of the bill, that there is a clear case of

probable irreparable injury to the plaintiffs." The court also held, as to that portion of the bill seeking to enjoin defendants from voting as proxies for shareholders who were not defendants, and who were not enjoined, that, having its hand upon the defendants associated in carrying out the projected fraud, it might properly enjoin them both from acting personally and as proxies, since otherwise the injunction might be utterly ineffective. The injunction accordingly restrained defendants from voting, either as proxies or otherwise.

A word of comment as to the form of the injunction as finally granted, and the history of this remarkable case, already perhaps too much extended, will be dismissed. Certainly the frame of the writ disclosed the hand of a master draughtsman. It enjoined, first, the inspectors of election from holding any election "wherein or whereat Brown Brothers & Company are enjoined and forbidden, or prevented by any judgment or process of any competent court, from casting, or said or any inspectors are prevented from receiving, the votes of Brown Brothers & Company upon the 26,666 shares of the capital stock of that company, standing in their names 'in trust,'" etc. Secondly, it enjoined the defendants, charged with the various acts of fraud alleged in the bill, from voting, either in person or by proxy, at the ensuing or at any election for directors, until the further order of the court, upon any shares whatever, "unless the said Brown Brothers & Company shall first have had an opportunity, free from injunction of any kind, of voting upon said shares so held by them in trust," etc. Thirdly, "that, until the further order of the said court, you, the said defendants, and each and every of you, your directors, agents, officers, servants, and proxies, do absolutely desist and refrain from any proceedings to restrain or prevent the firm of Brown Brothers & Company, or any member of that firm, from voting at the election of directors of the Pacific Mail Steamship Company, to be held in the city of New York on the 20th day of November, 1867," etc.

This extraordinary form of an extraordinary remedy was granted, as appears by the opinion of the court, upon the

very forenoon of the day at noon of which the election for directors was to be held. Whether the amply protected "firm of Brown Brothers & Company," thus panoplied around with a triple wall of injunction, were enabled to cast their vote in peace and safety, without fear of the threatened and impending hand of a Barnard or Cardozo, the reporter does not inform us. Certain it is that they had successfully bulled the market on Pacific Mail, and the literature of the profession may be searched in vain, to that time, for a more pronounced instance of one court attempting, by its injunction, to forestall like action by another tribunal of coördinate jurisdiction. It formed no unfitting prelude to the war of injunctions which raged in the courts of New York a few months later, and which has become historical under the name of the "Erie Railroad Row,"¹ in which the courts of the metropolis, beginning with the tame and uneventful practice of enjoining parties litigant, came at length, by easy and successive stages of judicial evolution, to the novel and entertaining procedure of enjoining each other.

This review of the authorities, it is believed, sufficiently indicates the well-defined jurisdiction of equity to restrain the election of officers of private corporations. That the remedy by injunction—the strong "right arm of the court"—should be cautiously granted for this purpose, need hardly be added. Indeed, the cases discussed clearly demonstrate that only the strongest showing of fraud and irreparable injury will suffice to set the court in motion. And the doctrine of "imperious necessity," enunciated by Chancellor Walworth, in *Walker v. Devereaux*, should be steadily adhered to in the exercise of a power so summary in its operation, and so far-reaching and disastrous in its consequences if misapplied. But, with becoming deference to so high an authority in equity jurisprudence, it is respectfully submitted that the learned chancellor carried the doctrine quite too far in asserting, in *Walker v. Devereaux*, that he

¹ For a graphic sketch of this disgraceful prostitution of the judicial station—the most shameful chapter in American jurisprudence—see an article entitled "The Erie Railroad Row," 3 *Am. L. Rev.* 41 (October, 1868).

might consider it his duty, to prevent a great and irreparable injury to a shareholder, to enjoin the election, "although the effect of that interference might be to destroy the charter of a corporation."

To the objection, sometimes urged to the interference of equity in this class of cases, that resort should be had to courts of law, it is sufficient to say that the existing legal remedies afford no relief adequate to emergencies such as are set forth in the preceding pages. The only legal remedy at all appropriate to cases of this nature is the information in the nature of a *quo warranto*, which, it is conceded, is the proper corrective for an unlawful intrusion into an office of a private corporation.² But its inadequacy to check abuses of the nature indicated lies in the obvious fact that it is merely a curative, and never a preventive, remedy; and that its attempted application in such cases would be only a rehearsal of the homely aphorism of "locking the barn after the horse is stolen."

Perhaps the most efficient remedy yet devised for the correction of frauds in corporate elections is that afforded by a statute of New York, enacted as early as 1825, and ever since in force in that state.³ This statute confers upon the supreme

² As to the propriety of proceedings in *quo warranto*, to correct an illegal usurpation of an office in a private corporation, see *Hullman v. Honcamp*, 5 Ohio St. 237; *Commonwealth v. Arrison*, 15 S. & R. 127; *Commonwealth v. Graham*, 64 Pa. St. 339; *People v. Tibbets*, 4 Cow. 358.

³ The provision of the New York statute in question is as follows: "It shall be the duty of the supreme court, upon the application of any person or persons, or body corporate, that may be aggrieved by, or may complain of, any election, or any proceeding, act or matter, in or touching the same (reasonable notice having been given to the adverse party, or to those who are to be affected thereby, of such intended application), to proceed forthwith and in a summary way to hear the affidavits, proofs, and allegations of the parties, or otherwise enquire into the matters or causes of complaint, and thereupon to establish the election so complained of, or to order a new election, or make such order and give such relief in the premises as right and justice may appear to the said supreme court to require; *provided*, that the said supreme court may, if the case shall appear to require it, either order an issue or issues to be made up in such manner and form as the supreme court may direct, in order to try the respective rights of the parties who may claim the same, to the office, or offices, or franchise in question; or may give leave

court jurisdiction to enquire, by a summary proceeding, upon the application of any person aggrieved, into the regularity and *bona fides* of any corporate election, and to establish the election complained of, or to order a new one, or to give such other relief as may be deemed necessary. The summary remedy thus afforded is in one marked respect superior to both the remedy by information in the nature of a *quo warranto* and that by injunction, in that the court is empowered to forthwith order a new election in the event of setting aside that already held. This statutory remedy seems in every way admirably adapted to the purposes for which it was intended, and frequent instances of its enforcement may be found in the New York reports.⁴

But until like remedies shall be provided in other states, or until legislative ingenuity shall have solved the double problem of a more effectual prevention and a speedier cure of corporate mismanagement, resort must still be had to the preventive aid of courts of equity.

J. L. HIGH.

CHICAGO.

to exhibit, or direct the attorney general to exhibit, one or more information or informations in the nature of a *quo warranto* in the premises." 1 N. Y. Rev. Stat. 603, § 5; 1 N. Y. Stat. at Large, 560, § 5.

⁴ See *Mickles v. Rochester City Bank*, 11 Paige, 118; *In re Mohawk & Hudson R. Co.*, 19 Wend. 135; *The Schoharie Valley R. R. case*, 12 Alc. Pr. (N. S.) 394; *In re Pioneer Paper Co.*, 36 How. Pr. 111.

III. REMOVAL OF CASES FROM STATE TO FEDERAL COURTS.

In this article I propose to consider several important points of the law of removal, as to which there is a difference of opinion among eminent jurists.

In United States Circuit Judge Dillon's admirable exposition of this branch of federal jurisprudence, published in the July number of this REVIEW for 1876, he considers that no action of the state court is necessary to effect the removal; that the constitutionality of the act of 1866, providing for splitting suits in some cases (the second subdivision of section 639 of the Revised Statutes), is "beyond question," and that this provision was not repealed by the act of 1875. He also intimates that the rigid principles of the early decisions, as to the necessity of the parties being exclusively citizens of different states, ought not to be applied to the act of 1875.

In the last number of the REVIEW Chancellor Cooper, of Tennessee, one of the greatest jurists of the South, came forward as the champion of the state courts, insisting upon the necessity of some action of the state court, parting with the jurisdiction of a case, before that of the federal court could attach; and contending that, even under the act of 1875, only suits *exclusively* between citizens of different states are removable. It is pretty clear that Chancellor Cooper thinks that this is the limit of the federal judicial power in this regard.

In *Cape Girardeau & State Line Railroad Company v. Winston*, 4 C. L. J. 127, United States District Judge Treat expressed the opinion that the splitting provision of section 639 of the Revised Statutes was repealed by the act of 1875.

but that, if not, the provision is unconstitutional; with reference to which utterance Chancellor Cooper, gratified at an unexpected ally, remarks that it is "refreshing" to find a federal judge who can "plumply" pronounce an act of Congress unconstitutional.

In *Osgood v. The Chicago, Danville & Vincennes Railroad Company*, 2 C. L. J. 273, United States Circuit Judge Drummond intimated that even if the act of 1875 provided (as we shall see it does) for the removal of the whole suit in cases where some of the plaintiffs have a common state citizenship with some of the defendants, yet this would not necessarily involve an unconstitutional result, which would seem to be the opinion also of Mr. Justice Bradley, from a remark made by him in *Lockhart v. Horn*, 1 Woods C. C. 628.

Other opinions might be quoted. I cite these merely to indicate the field of controversy.

I shall essay, with a good deal of confidence, to maintain the following positions:

First. That no action of the state court is necessary to effectuate the removal of a case therefrom to the federal court.

Second. That the question of removability belongs exclusively to the federal court.

Third. That the splitting provision of section 639 of the Revised Statutes (the act of 1866) is constitutional.

Fourth. That this provision has not been repealed by the act of 1875.

Fifth. That the judicial power of the United States is adequate to remove into the federal courts *all* controversies between citizens of different states, even if so blended with controversies between citizens of the same state that, in order to get possession of the former controversies, the latter must be dragged along with them.

Sixth. That the act of 1875 is broad enough for this purpose.

Chancellor Cooper complains that, in the matter of removals, the federal courts have shown a disposition to stretch their jurisdiction, and to treat the state courts with scant

courtesy—as alien and hostile tribunals. He urges that the state courts are as much bound by the acts of Congress as the federal courts, and are as little likely to err in the judicial construction of these acts as the “inferior” federal courts; and that, when they do err, they are equally subject to the revision of the Supreme Court of the United States. And he repels any imputation to the state courts of an unwillingness to part with their jurisdiction when a proper case is made out for removal.

As to this last matter, doubtless Chancellor Cooper speaks from his own clear consciousness of perfect fairness in such cases. But I am satisfied that generally the state judges *do* in some degree inwardly resent the supposed implication of attempts to escape out of their clutches into the federal courts. And then the very motive for giving the federal courts jurisdiction in controversies between citizens of different states presupposed the probability of a state court bias, which, if it existed, would of course incline against allowing its object to escape by a removal into the federal courts.

The federal judge might have a general bias in favor of federal power. But the state judge would be as apt to have a general bias in favor of state rights. And, then, the latter would lean against the removal through the very bias that made the removal desirable, and, additionally, from being touched at the supposed imputation of unfairness or inferiority involved in the application to remove.

Nor can I agree that, aside from its probably greater bias, the state court is as little likely to err in removal cases as the federal. The state court generally knows very little about this branch of jurisprudence, while the federal court cannot well help being familiar with it, since, as Judge Dillon tells us, a large proportion of its cases reach it through this channel.

A single federal district commonly includes several state circuits. A federal circuit contains several states. The United States circuit judge has to deal with removal cases from all parts of his circuit. The associate justices of the United States Supreme Court are also circuit judges. The district and circuit judges not only sit with them, but are, as

fellow circuit judges, in familiar communication with them. Thus the knowledge of the Supreme Court is diffused throughout the "inferior" courts.

Moreover, it can hardly be invidious to say "plumply" that the federal circuit judges (I do not now include the associate justices of the Supreme Court, who, however, are also circuit judges) are generally far abler than the "inferior" state courts. They are selected by a more rational process than the state judges, except in one or two states, and their tenure and compensation command a higher order of talents. The position of a United States circuit judge, in view of the territorial extent of his jurisdiction, the variety and magnitude of the cases that come before him (the very least must include \$500), the finality of his decisions in criminal cases, and in civil cases up to \$5,000, is felt to be one of more dignity than even the chief justiceship of a state. Compare, or rather contrast, Judge Emmons, or Judge Dillon, or Judge Drummond, or Judge Woods, with an average state circuit judge. How often do we find, on the bench of a state court of original jurisdiction, a profound jurist like Chancellor Cooper, whose preëminent perspicacity, vast erudition, and amazing power of dispatching business, rounded out and graced by consummate scholarship and literary attainments—wonderful had their acquisition been the sole labor of his life—would, in their rare and felicitous combination, reflect lustre upon the loftiest judicial position of the nation?

As to the ultimate revision of the Supreme Court, if one must, in order to achieve the right of removal, travel through the hierarchy of state courts away up thither, he had about as well abandon the right at once. That might have done in the days of Hilpa and Shallum; but in our present condition of crowded dockets, and with the span of existence reduced to three score and ten, it is wholly inadequate. Besides, in the shape of injunctions, receiverships, orders of sale *pendente lite*, etc., the state court may do an immense deal of damage before a finality is reached admitting of an appeal. And, then, it requires a plethoric pocket for so lengthy a litigious peregrination.

Chancellor Cooper is inclined to put aside the United States circuit court decisions upon the question of removability, as rulings of merely coördinate tribunals, to which the state courts owe no deference. He views a removal in the light of a change of venue. Mr. Justice Miller gave some countenance to this analogy in *Johnson v. Monell*, 100 U. S. 399, where it was suggested by the fact that the removal was sought under the act of 1867—the “local prejudice” act. But this conception of the matter is, in my judgment, erroneous.

“The right of removal from a state court by a defendant who is entitled to try his rights and assert his privileges in the national forum, is,” says Chancellor Kent, “the exercise of *appellate* jurisdiction; and the right of removal of a cause may exist before or after judgment, in the discretion of Congress.” 1 Kent, 321 (marg.).

“The act of 1875 provides that the federal court may issue a writ of *certiorari* to the state court, *commanding* said court to make return of the record, etc., and enforce said writ according to law.”

The acts of March 2, 1833, and July 16, 1866, also provided for a *certiorari* to the state courts, and, in prosecutions of the character removable by these acts, for a writ of *habeas corpus cum causa*.

The *certiorari* is, says Bouvier, “a writ issued from a superior court, directed to one of inferior jurisdiction, commanding the latter to certify and return to the former the record in the particular case.”

The truth is that, while in relation to the Supreme Court, the United States circuit courts are “inferior” courts, and while, in certain aspects, they are coördinate in dignity with the state courts of original jurisdiction, yet in relation to the latter they are superior as to removals from these to themselves. The federal, although limited, is the superior judicial power, since it belongs to it to trace its own limitations.

It will be expedient, before proceeding to the actual provisions of the removal acts, to consider briefly the compass of the federal judicial power as to cases within its scope.

In *Martin v. Hunter*, 1 Wheat. 338, the Supreme Court declared that, "in all the cases to which the judicial powers of the United States extended, they might rightfully vest *exclusive* jurisdiction in their own courts." Also, that the judicial power, being delegated in the most general terms, might be exercised under every variety of form of appellate or original jurisdiction. Also, that the exercise of appellate jurisdiction was not limited to the Supreme Court, but that Congress might create a succession of inferior tribunals, in each of which it might vest appellate as well as original jurisdiction. See, also, *Railway Co. v. Whitton*, 13 Wall. 288; 2 Story on Const. § 1732; 1 Kent, 318-320 (marg.).

Now, the judicial power extends to "controversies between citizens of different states." These controversies, then, might be confined to the federal courts. But it is, of course, competent to leave a concurrent jurisdiction over them in the state courts, subject to be withdrawn by the federal courts at any stage, and in any manner—*e. g.*, by a simple motion in the state court, or by filing there a petition and bond.

Of course, only proper cases may be made thus removable, and it requires judicial action to decide what cases have, and what have not, been made removable. But the question whether a given case be removable under an act of Congress, and the further question whether the act be constitutional, are federal questions embraced in another category of jurisdiction—that of cases arising under the constitution, laws and treaties of the United States. These questions also, then, may be confined to the federal courts. Ultimate and exclusive jurisdiction over them may be vested in the United States circuit courts; or their decisions may be subjected to the revision of the Supreme Court; or, in cases involving a given amount (say upwards of \$5,000), they may be subjected to revision, and be made final in cases involving less.

Of course, the circuit courts *might*, in this event, draw to themselves jurisdiction of *all* cases involving less than \$5,000; that is, this is logically *conceivable*, just as it is so conceivable that the Supreme Court might now, by it

decisions, extend federal jurisdiction over the whole field of jurisprudence. Any limited jurisdiction, with jurisdiction of the question of its own jurisdiction, *may* transgress the limits at its pleasure. Mr. Calhoun pressed this argument *ad nauseam* against all ultimate federal jurisdiction as to federal power. But the line between federal and state power must be drawn either by a federal or a state hand, and either might take the whole field to itself and leave the other nothing. The safer and only practicable alternative was to give the federal authority the right to determine as to its own limitations.

The judicial power, I repeat, was so conferred that, in the distribution of it, Congress might bestow exclusive and ultimate jurisdiction of any class of cases within the power on any grade of courts, including, of course, the question of their own jurisdiction.

All this is fundamental; but, in entering upon the discussion of vexed questions, nothing is so clarifying as a review of familiar fundamental principles.

I. Chancellor Cooper holds that the state court must perform some act, after a petition and bond for removal have been filed, before its jurisdiction ceases and that of the federal court attaches. He says: "The jurisdiction of the United States court cannot attach until the jurisdiction of the state court has terminated, and that can only be when the state court has acted upon the application. This was the uniform practice under the act of 1789."

This act provided that, upon the filing of the petition and bond, "it shall then be the duty of the state court to accept the surety, and proceed no further in the cause."

The language of the act of 1875 is that "it shall be the duty of the state court to accept said petition and bond, and proceed no further in such suit."

Now, if the state court has judicially to determine *anything* before there can be a removal, it *may* determine this adversely to the removal. In this case its erroneous determination, and consequent denial of the removal, would be simply error, subject, like other error, to reversal, but the

action of the court subsequent to the error would not be void. But the action of the state court subsequent to the application to remove has been emphatically settled to be, not merely erroneous, but absolutely void.

In *Gordon v. Longest*, 16 Pet. 97, the suit was commenced in a Kentucky state court, which, not satisfied that the amount involved was as much as \$500, refused the application to remove, and proceeded with the case. The Supreme Court, after stating that no objection could be made to the form of the application, nor to the facts on which it was founded, and that it was the duty of the state court to proceed no further, added: "*And every step subsequently taken in the exercise of a jurisdiction in the case was coram non judice.*"

"*Coram non judice*," says Bouvier, "is said of those acts of a court which has *no jurisdiction* over the person, the cause, or the process."

In *Insurance Co. v. Dunn*, 19 Wall. 214, this view of the matter was reiterated. It was there suggested that the company had consented to the jurisdiction of the state court after the denial of the removal, but the Supreme Court said: "The maxim that *consent cannot give jurisdiction* applied with full force. *Gordon v. Longest* is exactly in point, and conclusive."

Gordon v. Longest is applied to the same effect in *Stevens v. Phoenix Insurance Co.*, 41 N. Y. 154; *Holden v. Putnam Fire Insurance Co.*, 46 N. Y. 4; and *Bell v. Dix*, 49 N. Y. 237. In the last case it was declared that "the question of jurisdiction must be decided by the [United States] circuit court itself."

In *Insurance Co. v. Morse*, 20 Wall. 454, the court said: "In the case recently decided in this court, of *Insurance Co. v. Dunn*, it was held that *no power of action thereafter remained to the state court*, and every question, necessarily including that of its own jurisdiction, must be decided in the federal court."

In *Shaft v. The Phoenix Life Insurance Co.*, December 19, 1876 (6 Ins. L. J. 75), the Court of Appeals of New York said: "If the proceedings are regular, and strictly in accordance with the act of Congress, the state court is, *ipso*

facto, ousted of jurisdiction, and, whether the order of removal is granted or denied by the state court, all further proceedings therein are *coram non judice*, and void."

Surely these authorities are conclusive. I abstain from citing any United States circuit court decisions.

The following circumstance alone seems to me demonstrative of the view of Congress. Under all the removal acts prior to that of 1875, no matter when the petition and bond are filed in the state court—even if the very day before the session of the federal court—still, the transcript of the case has to be filed in the federal court on the very first day of its next term; and thereupon this court has to proceed in the case as if originally brought there. The act of 1875 gives twenty days, in any event, to procure and file the transcript, although this time may project into the term of the federal court. It was, of course, obvious to Congress that the state courts throughout a federal district would not be always in session, and that applications to remove might frequently be made only a few days before the meeting of the federal court, and when there would be no session of the state court to act upon the matter.

Again, the act of 1875 provides for a *certiorari* to the state court "commanding said court to make return of the record in any cause removed as aforesaid." It certainly did not occur to Congress that the *certiorari* to bring up the record could be necessary where the state court had consented to the removal. And, then, the cause is mentioned as "removed," though a *certiorari* be needed to bring up the record; that is, as having already been removed, without the action of the state court in obedience to the *certiorari*, and, of course, without its having consented to the removal.

Again, provision is made by the act of 1875 for the indictment of the state court clerk if he should decline to furnish copy of the transcript. But what good would the transcript do if the consent of the state court were necessary for the removal, and it were refused? Why indict the clerk for withholding what would be useless if furnished? And if the state court consented to the removal, the indictment could

not be necessary, as then the court would make its clerk furnish the transcript.

Again, the last part of section 7, of the act of 1875, contemplates proceedings in the federal court in certain cases where the steps to remove have been taken, but no state court consent has been given, and no transcript has been obtained.

Chancellor Cooper's sole reliance in support of his position, as to the necessity of state court action to effectuate the removal, is upon the italicised portion of the following quotation from the opinion of Mr. Chief Justice Waite, in *Railway Co. v. Ramsey*, 22 Wall. 328 :

"To obtain the transfer of a suit, the party desiring it must file in the state court a petition therefor, and tender the required security. Such a petition must state facts sufficient to entitle him to have the transfer made. This cannot be done without showing that the circuit court would have jurisdiction of the suit when transferred. The one necessarily includes the other. *If, upon the hearing of the petition, it is sustained by the proof*, the state court can proceed no further. It has no discretion, and is compelled to permit the transfer to be made. The petitioning party is then required to file in the circuit court copies of the process, and of all pleadings, depositions, testimony, and other proceedings in the state court. *This includes the proceedings by which the transfer was effected*, and these, as has been seen, must show the facts necessary to give the circuit court jurisdiction."

"This language," says Chancellor Cooper, "unquestionably recognizes, not merely the right of the state court to act upon the application, but the *necessity* of its action."

The case was this: The suit was removed from a state court in Chicago, and the papers were burned in the great fire. Thereupon the parties filed an agreement that the transfer had been made "according to the statutes in such case provided," and leave was given to supply the pleadings. The plaintiff obtained a verdict, whereupon the defendant moved in arrest of judgment upon the ground that the

pleadings did not contain jurisdictional averments. They needed not to contain such averments. Pleadings in state courts do not ordinarily contain federal court jurisdictional averments. These, in removed cases, are contained in the petition for removal. And here the parties had agreed that the case was properly removed; in other words, that the destroyed petition *had* contained the necessary averments. The court decided simply that, from the agreement of the parties, it must be taken that the petition had contained proper jurisdictional averments. This was not presumed from the consent of the state judge to the removal, but from the agreement of the parties in the federal court.

The quoted part of the opinion of the chief justice was a superfluous excrescence, not a "ruling," as Chancellor Cooper denominates it.

Chancellor Cooper understands the language, "if upon the hearing of the petition it is sustained by the proof, the state court can proceed no further," to imply that there is to be a hearing of the petition upon proof; and that, if the petition is *not* sustained by the proof, then the state court *can* proceed further.

Is it imagined that if A sue B in a state court, and B file a petition for removal, accompanied by a proper bond, A may controvert the jurisdictional averments of the petition, and thereupon the state court must hear the application upon the petition and the proof adduced? If so, then the denial of the removal, upon the ground that the petition was not sustained, could at most only be error; whereas we have seen that any proceedings of the state court subsequent to the filing of the petition and bond are, not only erroneous, but *coram non judice*, and wholly void.

All that the chief justice meant by the petition being sustained by the proof was, I take it, that it must not be falsified by the pleadings when taken in connection with it. As, for example, if the petition alleged that the amount in controversy was more than \$500, and the very declaration itself claimed only \$250; or, the petition alleged that the parties claimed under grants of different states, and the pleadings

showed that they both claimed under grants of the same state, or that no grant whatever was involved ; or, the petition alleged that the application was made at the first term at which the case could have been tried, and the record showed that the application was several terms too late. Other equally plain cases may readily be imagined.

Of course *something* must be done by the state court. It must see that a petition and bond have actually been filed; it must see that a case has been stated that is within the act under which the removal is sought. And when the petition and the pleadings are taken together, the former must not be falsified on the very face of the record. But this is all. The state court must not go outside of the petition and pleadings. If these, taken together, make up a *prima facie* case, the state court must "*proceed no further.*"

II. Whether the case be actually, as well as apparently, within the jurisdiction of the federal court, is a question for *that* court. The jurisdictional averments of the petition must be contested there, as similar averments must be in suits commenced there originally.

We have seen that, upon the filing of the petition and bond for removal, the state court is required, not to make an order of removal, but to proceed no further; and that thereupon, no matter when these were filed, the record must be filed in the federal court on the first day, or in any event within twenty days from the first day, of its next term. Thereupon that court is expressly required to proceed with the case as if it had been originally commenced there. Its assumption of jurisdiction is not conditioned upon any previous action of the state court parting with jurisdiction. The bond required by the act of 1875 provides for the payment of "all costs that may be awarded by the said circuit court if *said* court shall hold that such suit was wrongfully or improperly removed thereto." The federal court may issue a *certiorari* compelling the state court to send up the record. The federal court is to remand if the case was not a proper one for removal.

Unquestionably the federal court is obliged to deal with

the question of removability—that is, with the question of its own jurisdiction. If it improperly remanded, a *mandamus* was the remedy to compel it to take the case, until section 5 of the act of 1875 gave an appeal from an order to remand, irrespectively of the amount involved. *Railway Co. v. Wiswall*, 23 Wall. 507.

Now, may the state court independently consider the question of the federal court's jurisdiction? After the federal court has taken the case and disposed of it—*finally*, too, if the amount involved was less than \$5,000—may the state court hold that it was not removable, and dispose of it over again, perhaps differently? Thus the two courts might, in an equity case, decree affirmatively and injunctively contrariwise, each commanding and forbidding what the other forbids and commands! An ultimate appeal from the state court decree to the Supreme Court of the United States might in some cases cure the snarl, but this appeal could be taken only by the party denied the removal, and possibly he might be the party that succeeded on the merits in the state court, in which case he would not appeal; and if, as most likely, he were the successful party in the federal court, and he appealed from the state court decree, still, if the Supreme Court of the United States affirmed that decree, the snarl would revive, for the federal court decree could not be got rid of by the other party.

Chancellor Cooper sees the snarl, and solves it by reversing the whole machinery, and making it the duty of the federal court to decline jurisdiction until the state court chooses to part with it. Upon this idea, what becomes of the doctrine of *Gordon v. Longest*? Why was the transcript required to be filed in the federal court, irrespectively of previous state court action? Why was the *certiorari* provided for?

The solicitude of the law is for the federal court to take jurisdiction. Hence, as has already been noted, section 5 of the act of 1875 gives an appeal, irrespectively of the amount involved, from an order to remand. But an erroneous assumption of jurisdiction is left within the general provision requiring upwards of \$5,000 for an appeal.

Even if the state court regard the removal as proper, yet

if the case be remanded, it will take it back. *Jenkins Switzer*, Supreme Court of Pennsylvania, 7 Pitt. Leg. Jour. The proper tribunal will have decided the question, even erroneously.

We have seen that it is perfectly competent for Congress to vest in the circuit courts exclusive and ultimate jurisdiction of the question of their own jurisdiction. Their decision, however, *against* their own jurisdiction in removal cases has been made reviewable in *all* cases. Their decisions in favor of their own jurisdiction are reviewable only in cases involving more than \$5,000.

In *Bell v. Dix*, 49 N. Y. 237, as previously in *Illius v. Railroad Co.*, 13 N. Y. 598, it was expressly declared that "the question of jurisdiction must be decided by the [United States] circuit court itself."

In *Insurance Co. v. Morse*, 20 Wall. 454, which is perfectly conclusive of the matter, the court said: "In the case recently decided in this court, of *Insurance Co. v. Dunn*, it was held that *no power of action* thereafter remained to the state court, and every question *necessarily including that of its own jurisdiction* must be decided in the federal court."

The position that the question of removability is for the federal court is really only another aspect of the position that no action of the state court is requisite to effectuate the removal. The federal court finds in its hands a transcript from the state court, which may have come there without any action of that court. It is expressly commanded to proceed with the case as if originally commenced there. It cannot proceed a step without impliedly asserting its own jurisdiction. Of course, then, it must pass upon its own jurisdiction. It would be highly anomalous if the state court might pass independently upon the jurisdiction of the federal court. It is the duty of the state court, upon an application to remove, to halt until the question of removability has been determined by the federal court. If that court assume jurisdiction, even erroneously, still that is a valid determination of the question, and a final one, too, unless the amount involved exceed \$5,000.

III. The constitution extends the judicial power to controversies—that is, *all* controversies—between (it does not say *exclusively*) citizens of different states. It does not say “suits,” but “controversies.” The two words are not synonymous. One suit *may* contain a dozen separate and unconnected controversies. And where there is only one controversy there may be necessary parties to the suit who are not parties to its controversy. Such a suit was *Gardner v. Brown*, 21 Wall. 36, where a bill to foreclose a deed of trust was filed by the creditor against the debtor and the trustee. The trustee was a necessary party to the “suit,” but was no party to its “controversy.”

It is obvious that frequently a controversy is easily separable from the rest of the suit. Under the liberal practice in Tennessee, permitting a large amount of multifariousness in equity, frequently even several really distinct suits are blended into one. Such a suit might easily, and often advantageously, be split into its component parts, and these tried separately. I remember one suit—brought by the city of Nashville immediately after a change in the municipal administration, against nearly everybody who had ever had any transactions with the two preceding hostile administrations, charging fraud, want of authority, etc.—where it was found absolutely necessary to split the suit into four parts, to be separately disposed of. Here, perhaps, a thousand separate and distinct controversies were involved. The *Schuyler Fraud Case* (34 N. Y. 30), where there were several hundred defendants, furnishes another striking illustration.

Let us, for the sake of argument, here concede to the strict constructionists—what, nevertheless, I shall strenuously controvert—that the controversies within the federal judicial power are only those *exclusively* between citizens of other states; yet, at least, the judicial power must not be cheated out of these.

If the judicial power extended only to *suits* exclusively between citizens of different states, it would be of but little value, since, especially where the local jurisprudence tolerates almost unlimited multifariousness, a little ingenuity in joining

causes of action, or parties, might almost always elude the jurisdiction—unless, indeed, a component suit might be eviscerated from the composite suit in which it was included.

In the very class of cases where non-residents most need an impartial *inter-state* tribunal as a refuge from local prejudice—actions of *tort*—the jurisdiction could *absolutely* always be evaded by the simple process of joining, with the non-resident defendants, citizens of the plaintiff's own state. It never could be ascertained, except by the trial itself, that these were merely nominal and collusive parties.

The federal judicial power should, of course, interfere with the state courts just as little as possible, consistently with the attainment of its own proper ends. So that, had it the choice, whenever a separable controversy wholly between citizens of different states is embraced in a suit in a state court not wholly between such citizens, either to disengage and appropriate the mere controversy, or to take the whole suit in order to get the controversy, it is clear that it ought, in such a case, to be content with the mere controversy, and to leave the non-federal residue of the suit in the state court.

Now, this is the scope of a splitting provision, which is obviously a necessary feature in any complete removal scheme: where a suit not exclusively between citizens of different states embraces a controversy that is so, and that is separable, and can be fully determined as between its parties, to eviscerate this federal controversy for the federal court.

The actual provision of sub-section-2, section 639, Revised Statutes (the act of 1866), is a special case embraced within this general idea.

There is no difficulty in splitting a suit. When some defendants appeal from a decree, leaving it in force as to the rest, the appellate court hears the case thus split as to its parties.

When the Supreme Court of the United States hears a case that is there by writ of error to the highest court of a state, it considers only the federal questions that were decided adversely to the appellant—that is, it entertains the case split as to its questions.

Where the local state practice allows the proper subject-matter of law and equity to be blended in one suit, and this removed into the federal court, it has to be thereupon split and divided between the two sides of the court.

The constitution is not to be balked as to one of its important objects by so trifling an obstacle as the splitting a lawsuit.

If the judicial power is entitled to every controversy exclusively between citizens of different states, it cannot be circumvented by the liberality of the local practice, allowing such controversies to be combined with others; or by the generosity of the plaintiff, joining other parties who, while not merely nominal parties, are not really parties to the controversy.

Unless "controversies" is synonymous with "suits," the opponents of the splitting provision have no ground to stand on. But a simple inspection of the constitutional grant will suffice to show that the word "controversies" was advisedly selected as contradistinguished from "cases"—*i. e.*, suits.

Art. III, sec. 2: "The judicial power shall extend to all cases in law or equity arising under this Constitution, etc.; to all *cases* affecting ambassadors, etc.; to all *cases* of admiralty and maritime jurisdiction; to *controversies* to which the United States shall be a party; to *controversies* between two or more states; between a state and citizens of another state; between citizens of different states, etc."

Any of these controversies might or might not include the whole suit. It was intended to avoid *having* to take the whole suit, when not necessary, for the purpose of reaching the controversy.

To sum up, the constitution *says* "controversies," and must be taken to mean what it says; and its obvious discrimination between "cases" and "controversies" puts it beyond question that "cases" means cases, and "controversies" means controversies; and, then, to make "controversies" mean "cases" (and to interpolate *exclusively*) defeats the very aim of the constitution.

IV. There is no ground for supposing that the act of 1875 repealed the splitting provision of the act of 1866. The act of 1875 repeals *expressly* what is *in conflict* with itself. The repeal would have resulted anyhow, from the fact of conflict without the express provision. It would seem, then, that the "*expressio unius est exclusio alterius*"—that the express must be taken to mean that *only* conflicting provisions are repealed.

The doctrine as to repeals is thus clearly laid down in *Wood v. The United States*, 16 Pet. 363: "It is not sufficient to establish that subsequent laws cover some, or even all, of the cases provided by it (the previous statute); for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old, and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy."

Now, there is certainly no repugnancy between a statute that provides for the removal in some cases of *merely* the federal controversy of a suit, and another that provides only for the removal of the entire suit. The two are harmonious and complementary parts of one scheme.

Nor can it be urged that the act of 1875 has repealed the splitting provision by substantially reenacting it, since the act of 1875 contains no such splitting provision.

V. But in innumerable cases a controversy between citizens of different states is so inextricably blended with controversies between citizens of the same state, that, in order to get complete control of the former, the latter must be taken along with it. What is the judicial power to do in such a case? Is it to forego grasping the controversy between citizens of different states, or is it to take the whole apple in order to get the inseparable core to which it is entitled?

It has frequently happened, even under the straight-laced *régime* of the old jurisdictional provisions, that the federal courts have found it impossible to do justice in cases

ginally brought exclusively between citizens of different states, without letting in parties irrespectively of citizenship, and settling incidental controversies between citizens of the same state.

To meet this difficulty, what is known as the ancillary or auxiliary jurisdiction was invented by the Supreme Court.

Freeman v. Howe, 24 How. 460, Mr. Justice Nelson thus explains it: "The principle is, that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, is an inequitable advantage under *mesne* or final process, is not an original suit, but ancillary and dependent, supplementary merely to the original suit, out of which it has arisen, and is *maintained without reference to the citizenship of the parties*." He adds that "*any* party may file the bill (whether party to the original suit or not) whose interests are affected by the suit at law."

Mr. Justice Miller also explains the doctrine in Peay v. Schenck, Woolw. 183, which, however, presented only a restricted case for its application.

The proceeding is required to be upon the equity side of the court, which can with greater facility connive at irregularity of form for the purpose of reaching substantial justice, and it is christened ancillary, and tolerated under the aspect of a mere dependent graft upon the stem of an already subsisting suit regular in form; but, wink as hard as we may, we cannot help seeing that it is wholly indefensible if the judicial power extends only to controversies *exclusively* between citizens of different states. It is in its essence a non-federal fringe upon the garment of federal jurisdiction.

In upholding the ancillary jurisdiction irrespectively of citizenship, the Supreme Court stand committed to the rejection of the word "exclusively" from the construction of the judicial power over controversies between citizens of different states. The word is not in the grant. It requires construction to interpolate it. This construction, besides being an unwarrantable addition, would make the full exercise of the power impracticable. And, as we have seen, it has been.

impliedly negated by the Supreme Court, and the necessary incidental power covertly assumed.

Now, why not exercise precisely the same amount of jurisdiction, over precisely the same subject-matter and parties in a straightforward way—at least in equity cases—by combining into one bill both the original and ancillary bills, even if this do import into the comprehensive suit the same common state citizenship of some complainants and defendant that is allowable in the ancillary bill. Certainly, this must be just as unobjectionable as the double proceeding. Constitutional limitations are not to be eluded by mere formal devices of double proceedings.

The substance of the matter is, that if the judicial power could extend only to controversies *exclusively* between citizens of different states, the ancillary jurisdiction, irrespective of citizenship, could not be tolerated. That, however, being maintainable, it may be exercised just as well in a straightforward, comprehensive, original suit, with some common state citizenship of complainants and defendants, as by the device of double proceedings—the first one strictly regular, to serve as a main stem, the second exempt from restrictions as to common state citizenship, because christened ancillary, and conceived of figuratively, under the aspect of a mere graft upon the first.

But it being unwarrantable to interpolate the word *exclusively* into the grant of judicial power in controversies between citizens of different states, the door opens wider than to be in merely the measure of permissive common state citizenship that suffices for the incidental requirements of the ancillary jurisdiction. We must go the length of conceding that *wherever* there is a controversy between citizens of different states, whether exclusively or not, or whether a mere incident to a federal controversy or not, the judicial power may take and dispose of it. If it can disengage it from the rest of the suit, well and good. If not, then it must take and dispose of the whole case.

In *Lockhart v. Horn*, 1 Woods C. C. 628, Mr. Justice Bradley declared that if it were an original question, he would

old that the mere fact of a common state citizenship between some of the complainants and some of the defendants would not oust the jurisdiction, adding, "*it certainly would not under the constitution.*" The case would still be a controversy between citizens of different states."

VI. So much for what is constitutionally possible. It remains to consider the scope of the removal act of 1875 as to controversies between citizens of different states.

For convenience, I separate that portion of section 2 of this act, which it will be necessary to consider, into two clauses.

The first clause provides: "That any suit of a civil nature at law or in equity, now pending or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, * * * and *in which there shall be a controversy between citizens of different states*, etc., either party may remove said suit into the circuit court of the United States for the proper district."

The second clause then provides: "And when, in any suit *mentioned in this section*, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then *either one or more of the plaintiffs or defendants actually interested in said controversy* may remove said suit to the circuit court of the United States for the proper district."

The evident aim of the draughtsman here was to go to the verge of the constitution. That gives judicial power in controversies between citizens of different states; so he made every case removable "in which there shall be a controversy between citizens of different states." If the word exclusively must be implied in the constitution, then it must be implied in the act, also; otherwise, not. But section 2 was drawn under the idea that the restriction was *not* to be implied. For, if implied, the generality of the first clause shrinks to the special case of the second clause, regarded by the draughtsman as embraced within the first. The first clause provides for the removal by "either party" (*all* the plaintiffs

or *all* the defendants) of a suit "in which there shall be a controversy between citizens of different states" (whether *exclusively* so or not). The second clause gives the privilege of removing the suit to any one of the plaintiffs or defendants actually interested in the controversy of the suit—the real litigation—if this be, not only between citizens of different states, but between them exclusively, and capable of being fully determined as between them. In either case the *whole* "suit" is to be removed. Where the litigation is not wholly between citizens of different states, a whole "party" must unite to remove the suit; where the litigation *is* wholly between such citizens, any actual litigant may remove it.

But, mark that the second clause does not require the "suit" to be wholly between citizens of different states, but only that the "controversy" of the suit—the litigation—should be so. As already remarked, there may be necessary parties to the suit who are not parties to its controversy—not litigants. The court, to give full relief to the litigants, may have to act on parties having no interest in the controversy.

As an illustration of this, the case of *Gardner v. Brown*, 21 Wall. 36, has already been adverted to. There the trustee was a necessary party to the "suit," but was no party to its "controversy," which was wholly between the creditor and the debtor. But, in order to give relief to the creditor, who sought to subject to his debt property the legal title whereof was in the trustee, the latter had to be before the court. The removal was sought, however, under the act of 1866, which required that the suit, to be removable, must be one in which not only could there be a final determination of it so far as concerned the non-resident defendant, but this must be possible *without the presence of the other* (resident) *defendant* (the trustee) *as a party in the cause*. This restriction (omitted from the second clause of section 2, act of 1875) defeated the removal.

The act of 1866 provided, on behalf of the non-resident defendant, only "for the removal of the cause *as against him*." Both the first and the second clauses of section 2 of the act of 1875 provide for the removal of the whole suit.

Gardner v. Brown would be removable at the instance of either the creditor or the debtor under the second clause of section 2 of the act of 1875, for the suit would be one in which there was a controversy between citizens of different states (the category of the first clause), and of this class it would be one in which there was a controversy *wholly* between citizens of different states, and which could be fully determined as between them (the special case of the second clause, in which any one plaintiff or defendant "actually interested in such controversy" may remove). The trustee could be taken into the federal court, and the removal of the "suit" would, of course, take him there. The second clause does not contain the restriction of the act of 1866, that the suit must admit of a final determination of its controversy without the presence of the parties not interested in the controversy. They may be taken into the federal court, but *they* are not allowed to take the case there.

The suit will be removable by "either" party if there is in it litigation substantially between citizens of different states, although there be a common state citizenship between some of the litigant plaintiffs and defendants.

But it will be removable by any one *litigant* if the litigation (the "controversy") is *wholly* between citizens of different states, and can be fully determined between them, although there may be on both sides of the record other parties with a common state citizenship, but not litigants, whose presence (like that of the trustee in Gardner v. Brown) may be necessary for a complete decree.

The key to the interpretation of section 2 is the correlation of the words "suit" and "controversy." The controversy of the suit, as therein contemplated, is the contest—the litigation—in it.

The first clause embodies Mr. Justice Bradley's view, expressed in Lockhart v. Horn, that if there be litigation between citizens of different states, *that* is a "controversy" between citizens of different states, and within the judicial power, though some of the other litigant plaintiffs and defendants may be citizens of the same state.

The second clause provides for the case of a clean-cut federal controversy, where all the *litigants*, though not necessarily all the *parties*, are citizens of different states.

The more deeply one ponders this act, the more surely one perceives that all the intricacies of the subject were clearly present to the mind of the draughtsman.

Section 5 provides for the dismissal of the suit by the federal court if it shall appear "that the parties to said suit have been improperly or collusively made, *or joined*, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act." This seems to contemplate attempts to make a case removable by *joining* parties where, without the added parties, it would not be removable, showing that cases not wholly between citizens of different states are supposed to be removable; for an exclusive state of the record could not be created by a joinder, and, if it existed before, then a joinder would not be needed to make the case removable.

The cases of the Sewing Machine Companies, 18 Wall. 553, and *Vannevar v. Bryant*, 21 Wall. 41, turned upon the language of the act of 1867. This provides for the removal of a case "*in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state.*" It is perfectly clear that this act contemplates the parties to the suit and the parties to the controversy as identical. It was accordingly held in these cases that under this act are removable only suits wholly between citizens of different states.

But it is just as clear that the second clause of section 2 of the act of 1875 does *not* contemplate the parties to the suit and the parties to the controversy as identical. For, if it did, the words "*actually interested in such controversy*" would be useless. The controversy must be "*wholly between citizens of different states.*" The right of removal is, however, expressly restricted to "either one or more of the plaintiffs or defendants *actually interested in such controversy,*" showing that there might be other plaintiffs or defendants—other parties to the "suit"—*not* interested in the "controversy." These are not entitled to remove.

The opinion of Judge Dillon harmonizes with the foregoing views as to the extent of the federal judicial power: that, "if the real litigation is between citizens of different states, the case is within the constitutional grant of federal judicial power, notwithstanding some of the adversary parties may happen to be citizens of the same state with some of the plaintiffs."

Mr. Justice Bradley has already been quoted to the same effect. This likewise is pretty clearly the opinion of Judge Drummond. The act of 1875 has adopted the language of the constitution. The act has certainly carried out the full constitutional grant. The question what may be done under the constitution, and the question what has been done in this regard by the act, are one and the same.

In *Turner Bros. v. The Indianapolis, Bloomington & Western Railroad Company*, July term, 1876, Southern District of Illinois, Mr. Justice Davis and Judge Treat appear to have held that "the intention of Congress, as plainly expressed in the act of March 3, 1875, was that, where the main controversy in a case was between citizens of different states, it was removable, and carried with it all the incidents; and that a mere incident would not prevent the case from being removed." Judge Dillon thus states the substance of what was there decided.

On the other hand, Chancellor Cooper has taken a different view of the matter, and, in the case of *Mumford Smith and others v. The St. Louis Mutual Life Insurance Company and others*, recently decided by him, where the company filed a petition and bond for removal, he declined to surrender the jurisdiction.

Here a large number of Tennessee policy-holders united in suing the above company, claiming, mainly on account of its reinsurance and transfer of its assets, the right to recover certain premiums paid by them. They made the Insurance Commissioner of Tennessee a co-defendant of the company, merely to reach certain state bonds of the company in his hands, under a former law of that state, for the protection of its policy-holders. Chancellor Cooper consid-

ered that the presence of the commissioner as a defendant, with a common state citizenship with the complainants, was fatal to the application to remove.

The commissioner, however, though a necessary party to the "suit," was no party to the "controversy," which was wholly between the Tennessee policy-holders and the Missouri insurance company—citizens of different states—and could be fully determined between them, falling, in my judgment, clearly within the second clause of section 2 of act of 1875.

Suppose, however, that where the loose local practice admits of it, a *composite* suit be brought, consisting of several really distinct suits, and that the controversy of only *one* of the component suits be wholly between citizens of different states, how should the act of 1875 be applied here? Regarding the entire proceeding as one suit, still, literally, here would be a suit in which there was a controversy wholly between citizens of different states, and which could be fully determined as between them. Could, then, any plaintiff or defendant actually interested in the controversy of the one component suit remove the whole composite suit under the second clause of section 2 of the act of 1875? This provides for the removal only of the "*suit*."

It would seem an unwarrantable interference with state jurisdiction to remove the whole composite suit in a case like this merely because *one* of its separable component parts was properly removable.

The solution is to give such a construction to the word "*suit*" as will admit of eviscerating a removable component suit out of a composite suit. It will not do to let the loose local practice circumvent the federal judicial power. But the judicial power has no right except to its own controversy. If necessary, in order to get this, it may take everything; but if it can take only what belongs to it, it should there stay its hand. My conclusion is that, in such a case, an entire component "suit" might be eviscerated, by any one actually interested in its controversy, from a composite suit, by means of the second clause of the act of 1875. Thus this might

operate in some cases as a splitting provision of larger scope than section 639 of the Revised Statutes; but only when what was really an entire "suit" had to be disengaged and removed.

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IV. JURISDICTION OF PROBATE COURTS.

The administration and settlement of the affairs of persons deceased, minors, and persons of unsound mind, under the superintending control of the various courts having cognizance thereof, have always constituted an important and interesting branch of jurisprudence and the practice of law. In America this practice has developed into a complete homogeneous system, centering in courts created for this purpose alone, and armed with jurisdiction commensurate with the extent of the interests requiring its exercise.

When the American colonies severed their connection with the mother country, they inherited and carried over into the new sovereignties the forms and principles of its law, among them the laws with reference to the probate of wills, the appointment, removal, and powers of executors, administrators, and guardians. In England the tenacity with which prescriptive rights, customs, and prerogatives are maintained, the powers of ecclesiastical courts in the probate of wills and appointment of administrators, and of the court of chancery over minors and guardians, and trusts and trustees—among which executors and administrators are classed—exercise a conservative influence unfavorable to reform in this direction. But in the American states these influences are much weakened. Ecclesiastical courts, as such, are entirely unknown. The several legislatures had authority paramount to customs and traditions, and all prerogatives and prescriptive rights were swept away by the republican form of the governments. The equity jurisdiction, which it was deemed necessary to vest in courts of justice, emanated from the same source with their legal powers, to wit, statutory enactments. These circumstances left the convenience of the

people, their convictions and habits, free to exert a controlling influence in shaping the law and regulating the practice of settling and managing the estates of deceased persons and minors. No branch of the law concerns the general public so directly and immediately as this. A person may so regulate his conduct as to keep aloof from courts of criminal and civil jurisdiction, but the cases are rare indeed where he entirely escapes contact with courts of probate jurisdiction, either as an orphan or guardian, or as creditor or distributee of a deceased person. Hence it is that this branch of the law has suffered greater mutations and changes in the several American states than any other, and has finally vindicated for itself recognition as an independent system, complete within itself, as clearly distinguishable in its scope from other branches of the law as the criminal is from the civil, and differing in its practice and detail quite as much from the rules of common law and equity as the one of these does from the other.

It would be an interesting, and no doubt highly instructive, task to trace the growth and historical development of probate jurisdiction in the several states from that confided to courts of ordinary, originally created in some of the states in imitation of the English ecclesiastical courts, and governed, like these, by the canon law, down to the courts of probate jurisdiction of modern times, by whatever name they may be known, with full legal and equitable powers within their respective spheres of action. But such an undertaking would lead us beyond the limits assigned us, in which it is proposed to examine and develop the logical basis and scope of courts of probate, and the principles and elements of their power.

The word *administration*, in its narrowest legal sense, signifies the collection and distribution of the estates of deceased persons. But, in a more general sense, it is also applied to the management and control of the property of minors and of persons of unsound mind, and it will be convenient for our present purpose to use it in this more comprehensive sense. It may thus be technically applied to

the management and disposition of property which, on account of the death or mental incapacity of its owner, cannot be lawfully managed or disposed of without the intervention of some person clothed with the needful authority for this purpose by law.

The necessity for such intervention is inherent in the nature of property, which is not determined by any quality of the thing which is the subject of it, but becomes such by reason of having an owner. Thus *property* and *proprietor* are correlatives—the terms have significance only with relation to each other. Things (which alone can be the subject of property) are of themselves *res nullius*; they become property only by being subsumed under the *will* of a *person*. A person makes a thing his own—that is, *property*—when, by the manifestation of his free will, he *seizes* it, *takes possession* of it, or in any manner *changes its nature* or *form*. Or, if a thing be already property, he may become its owner by the *concurrence* of the will of the former owner with his own. In all of these cases *the thing* is subsumed under *the will* of the person. There is no other source of property, and as soon as the subsumption takes place the relation of property and proprietor springs into existence.

Some writers on law have styled this relation, rather inaccurately, the Rights of Things, to distinguish it from the relation between persons, which they designate the Rights of Persons. It is obvious that things have no rights, since they have no will, which alone is the basis of right and of its correlative duty. Things have no legal relation to each other; in so far as they are property, they are the subject of a relation between their owners and other persons with reference to the rights and duties of its owners. The law recognizes in property, not the thing which constitutes it, but the will of the owner, by force of which it is property.

Property, then, is such only by virtue of the free will of its owner, realized or accomplished in a degree deemed adequate in law. Not of the capricious or irrational will—because that is contradictory, and cancels itself—but of free, rational will, which the law recognizes as valid. It is

spected as property on account of no peculiarity or quality of the thing, but because, as property, it bears the impress of the will—that is, of the person—which has thus imparted to it its own dignity and quality. It is the dignity and quality of the person which alone is recognized in the recognition of property. Hence, if the will is withdrawn, abstracted from property, it will at once be restored to its original condition of *res nullius*. Such is the condition of things voluntarily abandoned; these become the property of whosoever appropriates them as effectually as if they had never been property. So, too, property which is voluntarily left in the undisputed possession of another becomes the property of the latter after the expiration of a certain time, the exact period of which is generally fixed by positive law. The voluntary refusal of the former to assert his will—that is, to exercise his ownership in the property—is precisely equivalent to a voluntary abandonment; his right to assert ownership is then said to be barred by *limitation*.

But the owner of property may be incapable of asserting his will therein. A person, having acquired property, may die without having disposed of the same, or he may become of unsound mind, and thus lose the power of asserting rational will. It is evident that neither a dead person, nor a person of unsound mind, nor any person not capable of exercising free will, can assert, or exercise any acts of, ownership over property. So far as they are concerned, their property has lost its essential quality—the will of its owner. And yet it would be a gross violation of the very nature and idea of property to permit it, in such cases, to relapse into the condition of *res nullius*. It has not been abandoned, for abandonment is a voluntary act—the exercise of free will with reference to a result to be achieved; and it cannot be said that the act of dying or becoming insane is a voluntary act, at least not with reference to the effect of such an event upon property. The relation between it and the insane or deceased owner is not at an end; it is still property. But for the will of the owner, no longer active or free, the law now substitutes his rational will—that is, its own universal

will—thus preserving the property and vindicating its essential character.

The law takes cognizance of the estates of deceased persons for the purpose of paying their debts and distributing the residuum to the heirs or legatees. This is not only a wise and necessary precautionary measure resorted to by all civilized communities to prevent the complications, the strife, and violence which must ensue if the goods of decedents were subject, as *res nullius*, to appropriation by the first bystander or comer who succeeded in laying hands upon the same, but it is eminently just, and necessarily involved in the nature and essence of property. And this for two reasons: *first*, because the will of an original owner is operative and valid in property, even after it has passed into the hands of a new owner; and, *second*, because the *creditors* and the *family* of a deceased person have well-defined, substantial interests in his property, which cannot, without violating their rights, be ignored or defeated.

The *family* is recognized by the law as the natural and immediate society of individuals, not based upon contract or agreement, but instituted by nature. Its members are united by the bond of mutual love, confidence, and voluntary obedience (*pietas*). Their relation and conduct toward each other is not so much the result of choice or deliberation as of instinct and affection. It is an organic totality, whose members have their true existence, not in themselves separately, but only through the totality in their relation to each other. Thus it is that they obey one will, which should be that of the head of the family; and in this sense the family constitutes but one person, which, in its legal relations to others, is, or is represented by, the head. In recognizing the existence and validity and nature of the family, the law accords to it the right to, and secures it in, the enjoyment of the necessary means of existence—property; and this even in a higher and more effectual manner than that in which it secures the property to the individual. The existence of the family as an aggregate person requires a permanent estate, adequate, not only to the capricious desires of a mere indi-

dual, but to the common collective wants of the several members. In this estate or property no one member of the family has an exclusive interest or possession, but each has a right to the common fund.

During the existence of the family its estate or property held by the head of the family, since, as we have seen, it constitutes but one person in its legal relations to others, governed and represented by one will, which is that of the head. It devolves chiefly upon him to provide the means of subsistence and of satisfying their various wants. He likewise controls, manages, and disposes of the property or estate, substantially at his pleasure, the only limit to his absolute control being a legal liability to support the wife and minor children, and the obligation to reserve a certain portion of the estate for the use of the wife if she should survive him. But at the dissolution of the family, by reason of the death of its head, the interest in the common fund, property, or estate, becomes at once a vested legal right in the several members—the property *descends* to them as *heirs*. It is quite apparent that in this process there is no substantial change of ownership of the property descending; the several members of the family simply assume the legal control of that which was theirs before, but held for their benefit by the head of the family. The law, in securing to them their inheritance, only gives effect to the *rational will* of the decedent.

We have seen that the head of the family has full control over its property, and may, with slight exceptions, dispose of the same according to his pleasure and caprice. This is an incident to ownership. As he may give it away during his lifetime, and thereby defeat the law of descent, so he may, with the same result, dispose of his property by means of a *last will* or *testament*. The power to devise or bequeath property by last will follows strictly from the *right of alienation*, which is an inherent and necessary element of ownership of property. There can be no property without the power of alienation, since, as has been shown, the will of the owner is the essential constituent of property. Hence any limitation of the power of alienation is an infringement of the

right of the owner; it is a violation of his free will. In selling, or bartering, or giving, or devising property, the owner does not withdraw therefrom his will—he does not abandon it—but, by an act of his own will, substitutes for it that of the new owner. The will of the alienor is thus clearly shown to constitute an essential element in the property of the alienee. The will of the former is preserved and his ownership recognized as valid in the recognition and validity of the ownership of the latter. It follows that any limitation of the power of alienation, whether by sale or gift during the lifetime, or by conditional or absolute devise by last will, is *ipso facto* an infringement of the right of property. The existence of such limitations, in the case of the head of a family, is not an arbitrary legal enactment, but a necessary consequence flowing from the family relation, and constitutes no real infringement upon the right of property, since it only determines that it shall be used for a rational end, protecting against the capricious or irrational will of the owner. Nor is there a distinction in this respect between the power to dispose of property by will or by deed; the limitations are precisely alike in both cases, at least in America.

The property of a decedent may thus be transmitted, by devise or descent, to a *minor*, who has not reached the age of discretion, or to a *person of unsound mind*, who, through his fault or misfortune, has lost the full use of his reasoning faculties. Or such persons may acquire property from other sources. It is obvious that unless they can own and enjoy the property devised, descended, or given them, the right of property in the testator, the intestate, or the donor is defeated; for it is the will of these parties, with reference to the property so transferred, that the devisee, heir, or donee shall hold and enjoy the same. Yet neither a minor nor a person of unsound mind possesses free will in the sense that it is necessary to acquire and hold property. We have seen that, in order to acquire property from another, there must be a *concurrence* of will in two persons; on the one hand, the will to *give* or convey, and, on the other, the will to *take* or hold. In such cases the law itself provides the comple-

ent to the will, which in the individuals is imperfect or wanting, by giving it a rational, valid content, and enabling them, not only to acquire, but also to hold and enjoy, property, thus vindicating at once its essential character and the personal rights of both grantors and grantees.

This, then, is the scope and sphere of administration: to apply the will-element in property, for the purpose of transmitting the same in case of death of the owner, and to acquire, enjoy, or alienate it in case of immaturity or soundness of his mind.

This is accomplished in a simple and efficacious manner by ministers or officers of law, with powers and duties commensurate with the exigencies requiring their intervention—*administrators*, to collect and distribute the estates of deceased intestates among creditors and heirs according to law; *executors*, to collect, manage, and distribute the estates of deceased testators among creditors, legatees, and devisees according to their last wills; and *guardians, curators, committees, tutors*, etc., to control, manage, and dispose of the estates of minors and persons of unsound mind. They are clothed with authority, and it is their duty to act for, and in the name of, those whom they represent, so far as their property is concerned, and to do in this respect precisely what the law presumes they themselves would do, or have done, if able personally to act.

The authority of these persons is in many respects similar to that which is vested in trustees, as known and recognized by the courts of chancery, and the principles applicable to the powers, rights, duties, and liabilities of both these classes of persons are so nearly identical that text-writers find it convenient to include them under the general head of trustees. There is, however, an obvious and essential distinction between them: while trustees, in the technical sense, usually derive their powers from the grantors, or creators of the trust, by their deliberate voluntary act, the authority of executors and administrators, of guardians, curators, etc., flows directly from the law itself. Their functions constitute an essential element of the law, as we have endeavored

to show, entirely independent of the personal views and intentions of all the parties concerned, whether as grantors, trustees, or *cestuis que trustent*. Trustees, also, are especially amenable to courts of chancery, being almost wholly ignored at common law, while administrators and guardians are usually under the control of a class of courts established and having jurisdiction for this especial purpose.

The creation of these courts—ordinaries, orphans' courts, surrogates, probate courts, or by what names soever they may be known—having jurisdiction over matters appertaining to administration, as above set forth, has undoubtedly been found exceedingly useful and convenient to the public, particularly to those directly interested either as wards, creditors, or distributees. But while to this circumstance may be ascribed the practical growth and historical development of the jurisdiction of this class of courts, yet the true distinction between them and courts of plenary common law and equity jurisdiction is not an arbitrary one, based upon the convenience of a particular class of litigants, but arises logically out of the nature of the functions performed by the several classes of courts, those of probate courts differing in essential particulars from those of the others.

The division of the powers of government into their constituent elements results, in all modern free states, in three grand departments, confided to separate and independent magistracies, known as the legislative, the judicial, and the executive. The distinctive functions and nature of each is indicated by its name, and it is sufficient for our present purpose to bear in mind that it is the office of the judiciary to interpret and apply the law, as established by the legislative branch, to individual cases or collisions as they arise leaving it to the executive branch to carry the law, as adjudicated, into execution. In this sense the judge may be said to be the organ or mouth-piece of the law to announce in each particular case the general will—that is, the will of the state—with reference to any actual or alleged collision therewith. In the exercise of this function the judge, with a directness peculiar to this branch of sovereign power

accomplishes the great office and end of the state, and of all government—the realization of will; that is, of will as determined and objectified; for will that is undetermined is not will, and is beyond the realm of law, which deals only with the actual. To the rational will of the individual (as objectified in an act), the judge, whenever called upon to do so, secures its legitimate fruition; to the capricious, irrational will he gives its logical content, holding it to its own logical results. Thus the judge gives validity to the individual will through the universal or general will, which is the law.

But we have seen that all property subject to administration is deficient in the will-element, which it is the very purpose of administration to supply. The court of probate jurisdiction is not, therefore, called upon to apply the law to any case of *collision* between the will of an individual and the general will or law. Its function is to provide will where it is wanting; to fill the vacuum created by the absence of individual will with the content of the universal will, and give effect to it—that is, to dispose of property under administration as the law presumes the owner would have done if competent to act.

It is the practical realization of this distinction which gives to probate courts their importance and value. The functions of the courts of probate involve many which are not purely judicial in their nature, such as the appointment of administrators, the qualifying of executors, the selection and confirmation or rejection of guardians and curators; fixing the amount and passing upon the sufficiency of bonds and sureties; supervising the investment of funds; examining, auditing, and passing upon inventories, appraisements, accounts, settlements, and reports; regulating payment of creditors and marshalling assets; directing the maintenance and education of minors, etc.—all of them duties and powers eminently proper to be lodged in courts having probate jurisdiction, but hardly of a judicial character. When functions or acts similar to these become necessary in proceedings before courts of general jurisdiction, they are performed by commissioners, auditors, referees, etc. To follow the same course

in courts of probate jurisdiction would not only be exceedingly inconvenient and costly—not to say impracticable—practice, but inconsistent with the basis and nature of probate courts and the system of administration as developed in our law. It would involve the forcible and irrational removal of the distinction between the several classes of courts, except the purely formal and arbitrary one of limiting the powers, and hence the usefulness, of one of them. Practically and essentially the result would be the same as if courts of general judicature were invested with original probate jurisdiction; they would be burdened with a class of duties repugnant to their office, the proper performance of which must necessarily be assigned to adjuncts, involving expense, delay, and complication.

From this it appears that the same logical necessity which requires the system of administration in order to preserve the character and essential nature of property and the rights of its owners—in other words, to enable the state to perform its high office of securing justice—also requires the establishment of a particular class of courts to control and carry out that system. All civilized governments have felt, and more or less fully met, this necessity, but nowhere is the law of administration so fully and thoroughly developed as in the several states of the American Union; and in no other country, not even in England, is the jurisdiction of courts of probate so admirably adapted and fitted to the requirements of the system, covering, in their aggregate scope throughout the United States, though perhaps in no one single state, all the subjects involved in the organic totality of probate law.

The *subjects of jurisdiction* properly belonging to probate courts, under the principles above set forth and the theory developed therefrom, may be grouped and enumerated as follows:

First. With reference to estates of deceased persons.

I. *Intestates.* (1) Appointment of administrators.

II. *Testators.* (2) Probating wills. (3) Qualifying executors. (4) Appointing administrators with the will annexed.

III. *Decedents*, whether testate or intestate. (5) Fixing

nount of bonds of administrators and executors, and passing upon the sufficiency of sureties. (6) Receiving and passing upon inventories and appraisement. (7) Determining and adjudicating claims, of whatever nature, against estates of decedents. (8) Ordering payment of claims, including the power to direct the sale of personal and real property to this end, marshalling the assets in the hand of administrators and executors, and determining the priority of creditors. (9) Setting the accounts of administrators and executors between them and the estates administered by them, including the power to determine their liability, and to enforce it against them and the sureties on their bonds. (10) Directing the investment of funds in the hands of administrators and executors, and the general management of the assets. (11) Determining the interest of widows, heirs, legatees, and devisees, including the power to assign dower, set out homesteads, and partitioning lands among heirs and devisees, and enforcing distribution among those entitled. In general words, control over administrators and executors in taking possession of the property of deceased persons, and distributing it to widows, creditors, heirs, legatees, and devisees.

Second. With reference to the estates of persons not competent to act in their own right :

I. *Minors.* (12) Appointment and removal for cause of guardians or curators, including the qualifying of testamentary guardians, and of natural guardians with reference to property not derived from them, and sanctioning and qualifying guardians and curators chosen by the minors of proper age to choose. (13) Directing the education of minors, including the power to appropriate the means therefor out of their estates, and ordering the sale of personal and real property to that end.

II. *Persons of unsound mind.* (14) Power to adjudge persons of unsound mind, including lunatics, idiots, habitual drunkards, spendthrifts, and other persons incapable of managing their affairs. (15) Appointment and removal of guardians, curators, committees, etc., for persons adjudged *non compos mentis*. (16) Power to provide for their safe

keeping, confinement, support, and comfort, and for the maintenance and support of their families out of their estates. (17) Power to adjudicate the restoration of such persons to their right mind, and enforce settlement between the guardian and the person so restored.

III. *Persons not competent to act sui juris*, including minors and persons of unsound mind. (18) Fixing the amount of bonds of guardians and curators, and passing upon the sufficiency of their sureties. (19) Enforcing and passing upon inventories and appraisements. (20) Adjudicating upon claims against wards. (21) Settling the accounts of guardians and curators between them and their wards, including the power to determine the liability of guardians and curators, and enforcing the same in favor of the wards against them and their sureties. (22) Controlling the management of wards' estates, directing investment of funds, and the leasing and sale of real property. (23) Directing the support and maintenance of wards out of their estates, and appropriating the necessary means therefor. Or, in general words, control over guardians and curators in taking charge of the estates of their wards, in managing the same for the ward's interests, and delivering the same to the persons thereto entitled.

These powers, together with such incidental powers as may be necessary to give them effect, constitute the whole sphere of probate jurisdiction involved in the restoration, by operation of the law, of property which has become deficient in its will-element by reason of death or incapacity of its owner, to its normal condition.

But in no single instance have all the powers enumerated been confided to a court of probate jurisdiction, either in the United States or elsewhere. In each of the states these courts lack a portion of these powers. But what is withheld from them in one state is granted to them in another, so that every one of the powers enumerated will be found to be lodged in one or more of the aggregate number of courts of this class in the several states. Thus, for instance, while

the power to probate wills, appoint executors, administrators, guardians, and curators is possessed by them in all the states, but few of them have power to assign dower, partition lands, or set out the homestead of the widow and minor children. So, too, the probate courts in some of the states have exclusive original jurisdiction of claims against the estates of deceased persons, while in others the creditors are referred to the courts of common law or equity jurisdiction to establish them. Suits on bonds of administrators and guardians must in most states be brought in the courts of general jurisdiction, while in some of them very summary powers are given to probate courts over the principals and sureties in these bonds. And so with reference to most of the subjects of jurisdiction as enumerated above. The reader is too familiar with the subject to derive any information from a multiplication of instances.

The cause of this diversity in the extent of powers confided to courts of probate in the several states is too obvious to need explanation. It would be almost a miracle if the thirteen original states had preserved unchanged their laws upon this subject, throughout the rich and manifold experiences of a century of rapid growth and development, if even they had been alike in the beginning; more wonderful still if the changes in their laws, and in the laws of those states which have since then assumed their respective stations in the Union, had been identical. Nevertheless, the tendency in all of the states has been, and is now, unmistakably to recognize probate jurisdiction as a distinct, independent branch of the law, destined to achieve for itself a sphere of jurisdiction entirely *sui generis*, and based upon and determined by its own inherent principles.

J. G. WOERNER.

ST. LOUIS.

V. THE REPORTERS AND TEXT-WRITERS.

'Twill be recorded for a precedent;
And many an error, by the same example,
Will rush into the state.

—[*The Merchant of Venice*, Act IV, Scene 1.

ABRIDGMENTS.—Such works, with all their use, can rarely be ultimately relied on. The opinion of a court can hardly be so abridged as to convey all the circumstances which had their weight in a determination—something will escape in the transfusion. A patient reading of the particular cases reported at length, more minutely to discern the grounds and principles upon which they were adjudged, is necessary to form clear conceptions of the law. See Reeves' English Law, vol. V. pp. 244, 245.

AMOS (Sheldon).—"A distinguished jurist." *The Queen v. Keyn*, L. R. 2 Exch. Div. 188, per Cockburn, C. J.

ANGELL ON WATERCOURSES.—"A book often quoted in our courts." Lord Selborne in *Lyon v. Fishmongers' Co.* L. R., 1 App. Cases, 683.

ARCHBOLD. CRIMINAL PLEADING AND EVIDENCE.—"A work of great ability." Williams, J., in *The Queen v. Wilson*, 6 Q. B. 628. It is constantly cited as direct authority by the American courts. But see *The Queen v. Ion*, 2 Denison C. C. 488.

AUTHORITIES, CITATION OF.—Lord Bacon, in the preface to his *Rules and Maxims*, says that he might have made an ostentation of learning by vouching authorities, but that he abstained from it, "having the example of Mr. Littleton and Mr. Fitzherbert, whose writings are the institutions of the laws of England, whereof the one forbearth to vouch authority altogether, and the other never reciteth a book but

when he thinketh the case so weak of credit in itself as it needs a surety."

What Bacon here says relates to Fitzherbert's *Natura Brevium*. Fitzherbert's *Abridgment* rests wholly on authorities either taken from the Year-Books or from original cases now nowhere else extant.¹

BACON'S RULES AND MAXIMS.—See AUTHORITIES, CITATION OF.

BISHOP. COMMENTARIES ON THE CRIMINAL LAW.—"An elaborate and learned work." *The Queen v. Keyn*, L. R. 2 Exch. Div. 188, per Cockburn, C. J.

BLACKSTONE'S COMMENTARIES.—"He it is," remarks Lee, one of the editors of the Commentaries, "who first of all institutional writers has taught jurisprudence to speak the language of the scholar and the gentleman; put a polish on that rugged science; cleaned it from the dust and cobwebs of the office; and if he has not enriched her with that precision that is drawn only from the sterling treasury of the sciences, has decked her out, however, to advantage from the toilet of classical erudition; enlivened her with metaphors and allusions; and sent her abroad in some measure to instruct, and, in still greater measure, to entertain, the most miscellaneous and the most fastidious taste."

BRACTON.—See COKE ON LITTLETON.

CAMPBELL (Lord). LIVES OF THE CHIEF JUSTICES.—Lord Campbell's qualifications as a biographer have been frequently arraigned. On the first publication of his "Lives of the Chief Justices" he was very roughly handled in "The Law Magazine" and other Reviews.

"We regret," says the writer in "The Law Magazine," "that Lord Campbell should have considered it necessary to introduce anecdotes of pure surmise, ill-suited to the refined taste of the age, and unnecessary for any historical purpose."

"Lord Campbell has confounded, or not rightly understood, the distinction between true and false. * * * His political virus oozes out in sly general remarks and bantering

¹ The Southern Law Review, N. S. Vol. II. pp. 726, 727; 9 C. B., N. S. 198 notes.

innuendoes." *Law Magazine*, vol. XLIII. p. 5, 209, quoted in the preface to the *Life of Lord Kenyon*.

CASPAR'S FORENSIC MEDICINE.—Translated by BALFOUR, London. Published by The New Sydenham Society, 1861-1865. 4 vols. 8vo.

This work may safely be pronounced one of the very best on this important subject, as exhibiting the science by the hand of a writer of great experience and practical skill. It is regarded as authority.

COKE (Lord).—"I have a great respect for the memory of Lord Coke," said Lord Redesdale, "but I am ready to accede to an assertion made by some of his contemporaries, that he was too fond of making the law instead of declaring the law, and of telling untruths to support his own opinions. Indeed, an obstinate persistence in any opinion he had embraced was a leading defect in his character. His dispute with Lord Ellesmere furnishes us with a very strong instance of his forcing the construction of terms, and making false definitions, when it suited his purpose to do so. Mr. Hargrave has shown the statement of the law in the passage [1 Inst. 244] which governed the judgment of the Committee [of Privileges] to be untenable. It is not borne out by the authority referred to by the text, and is inconsistent with the earlier and later decisions." *Banbury Peerage Case*, reported in an Appendix to *The Barony of Gardner*, p. 437.

COKE ON LITTLETON.—"Coke cites Bracton very often, and the quotations which he gives from Bracton are sometimes pure transcripts from the *Corpus Juris*, which Bracton embodied in his work. Coke used Bracton and the old writers so far as served his purpose, and sometimes he abused them. But Coke succeeded in forming a good deal of the law after his own way." *Long's Two Discourses*, pp. 89, 107.

DAVIES' (Sir John) REPORTS.—The preface to these reports is very highly esteemed. It has been said to vie with Coke in solidity and learning, and equal Blackstone in classical illustration and elegant language. *Pearce's History of the Inns of Court*, p. 294.

DYER'S REPORTS.—These reports contain select cases from

4 Henry VIII. to 24 Elizabeth, published by his nephew in 1585, folio, in French. Their "grandeur and dignity," in the opinion of Sir Harbottle Grimston, "are an ample recompense for any failure in the number of persons reporting." They were five times reprinted, and an English translation was first published by Mr. John Vaillant, in three volumes, 8vo., 1794, with a life of the author from a MS. in the Library of the Inner Temple. "Let his own works praise him in the gates," exclaims old Fuller. "Let his learned writings, called his commentaries or his reports, evidence his abilities in his profession."

In the preface to Vaillant's edition he says: "The earliest edition I have been able to obtain is that of 1592, being the second, which is in the Library of the Middle Temple, and with the use of which I was favored by that learned society." And in a note he adds: "Since this work has been nearly all printed off I have met with an edition of 1585, but it came too late to be of any service, and that of 1592 seems very correct."

The writer has a copy of the edition of 1585, with marginal notes in court hand in the hand-writing of "Brownlowe, ye Prothonotary." On the fly-leaf is this note: "Often quoted by Lord Coke, as a MS. in his possession in the hand-writing of Ld. Dyer: Co. Lit. 9 a, 58, 148 b, 2 Inst. 657. It appears to be a different collection from that extant in print, as several of the cases quoted by Lord Coke are not to be found in the printed book. Vide 3 Inst. 126, 127; 4 Inst. 61."

FITZHERBERT'S *NATURA BREVIUM*.—See AUTHORITIES, CITATION OF.

FORAMITI (Signor). *L'ADVOCATO MARITTIMO*.—"A short but very able treatise." The Queen v. Keyn, L. R. 2 Exch. Div. 190.

GABBETT'S *TREATISE ON THE CRIMINAL LAW*.—A work at once remarkable for its lucid style and singular accuracy. In Mr. Bishop's *Commentaries on the Criminal Law*, vol. II. § 506 note is this passage: "The reason why I quote from this book, here and in one or two other places, is not that it

is of the highest merit, but because its author excels in stating mere points and nothing else. He collects the old points from the standard books as servilely and almost as accurately as if he were a machine. If he possessed capacity of a higher order, he would not be likely to do this drudgery so well; or, at least, he would not be likely to copy a legal absurdity in precisely the same way as a well-proportioned legal truth." This flippant criticism could only proceed from a superficial or careless examination of the book, or from a selfish motive.

GALE ON EASEMENTS, 3d ed., with Notes, by W. H. Willes, Esq.—"The author's plan is to state the principal cases at full length—Mr. Willes' merely to glance at them—referring to the same case repeatedly, in different places, and backwards and forwards to his own notes. To appreciate his notes the reader should be a cleverer animal than Sir Boyle Roche's bird, and in more than two places at once." Preface to the fifth edition.

GROTIUS' (Hugo) DE JURE BELLI ET PACIS.—The treatise of Grotius "De Jure Prædæ," which was completed by the author at the commencement of 1605, is a remarkable work for a youth of twenty-two years to have composed. The "Mare Liberum," which forms the twelfth chapter of this work, was published apart from the body of the work in the month of November, 1608. The Commentarius, "De Jure Prædæ," became the scaffold of the greater work, "De Jure Belli et Pacis," which Grotius undertook, during his exile, at the suggestion of Peirescius, and upon the advice of Lord Bacon, and which was published in Paris in 1625. Travers Twiss in *The Law Magazine and Review*, No. 223, p. 160 note. 1877.

HALE'S PLEAS OF THE CROWN, Vol. I. p. 154.—"Here, again, we have Lord Hale blindly following 'Master Selden' in asserting," etc. Cockburn, C. J., in *The Queen v. Keyn*, L. R. 2 Exch. Div. 195.

HEFFTER. THE PUBLIC INTERNATIONAL LAW OF EUROPE.—"A highly esteemed work." *The Queen v. Keyn*, L. R. 2 Exch. Div. 186, per Cockburn, C. J.

HOLROYD (Mr. Justice).—"Than whom no judge was ever more accurate in expressing his meaning." Blackburn, J., *The Queen v. Tugwell*, 9 B. & S. 372.

HUMPHREYS (James). *OBSERVATIONS ON THE LAWS OF REAL PROPERTY*, 2d ed. 8vo. London. 1827.—"Profound, original, useful, and learned." This is the opinion expressed by that eminent conveyancer, the late accomplished and learned Mr. Charles Butler, in his life of D'Aguesseau, p. 59.

JENKINS (Sir Leoline).—"The charge of Sir Leoline Jenkins² is unfortunately open to the remark that it is declamatory, and, therefore, inexact. Yet it is a statement of the law, upon the very point of the jurisdiction of the admiralty over crimes, made by one of the most learned of English civilians and international lawyers. It is reported by Curteis for, and judicial exposition of, the law." *The Queen v. Keyn*, L. R. 2 Exch. Div. 147, per Brett, J. A.

KENYON'S REPORTS.—"On February 10, 1756, he was called to the bar, but for several years he was almost unemployed. As a diversion he began to attend the Court of King's Bench, and to take notes of the cases argued there before Lord Mansfield, then commencing his long and splendid judicial career. Many years afterwards some of these *quasi* reports were collected and published.³ They are for the most part more notes of cases than actual reports, but they are clearly put together, and show that their author must even thus early have attained to considerable proficiency in the craft." *Life of Lord Kenyon*, p. 16.

MIROIR AUX JUSTICES.—"This is one of the most valuable expositions of the common law extant. It appears to have been compiled by Andrew Horne in the reign of Edward II., though the substance of the book was evidently the production of a much more remote time." *Pearce's Inns of Court*, pp. 6, 24.

² In the reign of Charles II., Sir Leoline Jenkins, then the judge of the Court of Admiralty, in a charge to the grand jury at an admiralty sessions at the Old Bailey.

³ With notes and references, by Job Walden Hanmer. 2 vols. 8vo. London. 1819-25.

MOORE'S PRIVY COUNCIL CASES.—“A learned and experienced reporter.” Warren's Law Studies, vol. II. p. 1415.

Lord Wensleydale: “If we are to enquire into this question, it will require some research. The whole question is ably and distinctly stated in a note appended, by the learned editor, to the case of Sherwood v. Ray, 1 Moore, P. C. C. 353, 355.” Brook v. Brook, 9 House of Lords Cases, 243, 244.

NOY'S REPORTS.—Throughout the report of the case of Conustable v. Clowbury, p. 75, the word “ship” should be substituted for “wife.” In the notes originally taken by Noy the word would probably be “nief,” which might be rendered either “ship,” or the “wife of a villein.” 2 Man. & G. 18 note.

PALEY ON CONVICTIONS, 5th ed., p. 63.—“The passage is not warranted by the authorities, and is in apparent conflict with *In re Allison*, 10 Exch. 561.” Fitzgerald, J., in *The Queen v. Unkles*, Irish Rep. 8 C. L. 55.

PRIVY COUNCIL, JUDGMENTS OF.—“The judicial committee of the Privy Council is an independent tribunal; it is in no way a court of appeal from the courts in Westminster Hall, and the courts in Westminster Hall always have held they are not bound to adopt the decisions of the Judicial Committee of the Privy Council unless they are true expositions of the law contained in them. At the same time I need hardly say, by way of expressing my own individual opinion, that the judgments of the Judicial Committee of the Privy Council are entitled to the greatest weight, and, although not binding judgments, they are entitled to the greatest consideration, and ought to be viewed with the greatest respect by any court of this country which has to consider their authority.” Coleridge, C. J., in *Merchant Shipping Co. v. Armitage*, L. R. 9 Q. B. 105, in Cam. Scacc.

REEVES' HISTORY OF THE ENGLISH LAW.—“Valuable, though sometimes tedious.” Sir Roundell Palmer, in an Address to Law Students.

WEST'S SYMBOLEOGRAPHY.—“Mr. West having occasion, in his book of Presidents, to give a general account of obligations, contracts, offences, etc., has unskilfully epitomized

d translated the account from Herm. Vulteijs, and passed off for the pure common law of England." Preface to Wood's "New Institute of the Imperial or Civil Law," London, 1704. "The reader may see how West did his work in his "Symboleography." Long's Two Discourses, p. 108. WOOD (Baron).—"He was one of the greatest of pleaders." Hayes, J., in The Queen v. Diplock, 10 B. & S. 175..

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VI. A POINT OF CHANCERY PRACTICE.

A point of chancery practice about which learned doctors have differed for over a hundred years would seem to be worthy of the consideration of even as grave a Law Reviewer as Mr. Justice. Such a point we find in the extent of the discovery which a defendant may be required to make of matters in his account where the complainant's right to the account is denied.

The general rule undoubtedly is that every objection to a discovery which is founded upon a denial of the plaintiff's right of suit, or of his right to proceed with it in its existing state, should regularly be taken by demurrer or plea, according to the form of the bill; and where the objection is not so taken, and the defendant answers the bill, he will be held to have waived the objection, and will be obliged to answer the bill throughout. *Mazerredo v. Maitland*, 3 M. & C. 66; *Lancaster v. Evors*, 1 Phill. 349; *Swinborne v. Nelson*, 1 Beav. 416; *Elmer v. Creasy*, L. R. 9 Ch. App. 69; *Bank of Utica v. Messereau*, 7 Paige, 517. The reason is that the complainant is entitled to a full discovery of all facts alleged in the bill, which may be important to the complainant in case he should succeed in showing that the particular defence attempted to be set up in the answer is false and unfounded. For, were the rule otherwise, the defendant, by putting in an answer denying some particular allegation which is necessary to the title of the complainant to relief, and putting every other allegation of the bill in issue by a general traverse in the usual form, might throw upon the complainant the burden of proving many things as to which he was entitled to a discovery, if the particular denial of the answer turned out to be unfounded. There are exceptions

ever, to the general rule, about which there never has been any conflict; such, for instance, as privileged communications, and discovery which might subject the defendant to penalty or forfeiture. *Stratford v. Hogan*, 2 B. & B. 164; *Thurhurst v. Lowton*, 1 Mer. 400; *Cooke v. Turner*, 14 Sim. 1; The defendant is, moreover, not bound to answer matters purely scandalous, impertinent, or immaterial. *Agar v. Great Canal Co.*, Coop. Ch. Rep. 212; *Utica Ins. Co. v. Finch*, 3 Paige, 210. The reason for these exceptions is that, even if the defence had been made by demurrer or plea, and overruled, the complainant would not be entitled to the particular discovery, and, therefore, it could make no difference if the defence were made in the first instance by answer. The exception of a *bona fide* purchaser for value and without notice rests upon the same ground, such a purchaser being so under the protection of the court that he will not be required to discover until the fact is disproved, even if he make defence by answer. *Jerrard v. Saunders*, 2 Ves., jr., 4; *Methodist Episcopal Church v. Jaques*, 1 Johns. Ch. 65. The English decisions have recently done away with this exception. *Ovey v. Leighton*, 2 Sim. & Stu. 234. And Chancellor Walworth doubts its propriety on principle. *Cuyler v. Bogert*, 3 Paige, 187. Another exception has been made where the defendant disclaims all interest, although the authorities are conflicting. *Cookson v. Ellison*, 2 Bro. C. C. 252; *Newman v. Godfrey*, 2 Bro. C. C. 322; *Green v. Winter*, cited 4 Johns. Ch. 214; *Richardson v. Mitchell*, Sel. Ch. 51.

When we come to the direct question whether the defendant, who denies by answer the complainant's right to an account, is nevertheless required to give the account called for, the decisions are even more conflicting. Lord Maccalesfield held, in *Stephens v. Stephens*, cited in Sel. Ca. Ch. 51, that he must discover; while Lord Hardwicke, in *Gethin v. Gethin*, cited Amb. 353, reached the opposite conclusion. And Lord Thurlow, in *Shepherd v. Roberts*, 3 Bro. C. C. 239, which was a bill for a partnership account where the defendant denied the partnership, held, first, that the defendant must

give the account called for, but afterwards, as we learn from Lord Loughborough in *Jerrard v. Saunders*, 2 Ves., jr., 457, and from a note of the editor to *Hall v. Noyes*, 3 Bro. C. C. 483, reversed himself, and held the answer sufficient without the account. Lord Loughborough declared himself strongly in favor of the latter ruling in *Marquis of Donegal v. Stewart*, 3 Ves. 446, and *Phelips v. Carey*, 4 Ves. 107. The court of Exchequer, on its equity side, has always ruled the point in that way. *Randall v. Head*, Hardr. 188; *Sweet v. Young*, Amb. 353; *Jacobs v. Goodman*, 2 Cox, 282; *s. c.*, 3 Bro. C. C. 488, note; *John v. Ducie*, 13 Price, 632. And the inclination of Chancellor Kent, upon a review of the authorities, was in the same direction. *Phillips v. Prevost*, 4 Johns. Ch. 205.

The question came before Lord Eldon on several occasions, who, while he hesitated, as was his wont, to overrule the current of decisions then prevailing, indicated a leaning to the contrary doctrine. *Shaw v. Ching*, 11 Ves. 283, and *Rowe v. Teed*, 15 Ves. 376. These doubts of their great chief were made certainties by Sir John Leach in *Mazzeredo v. Maitland*, 3 Mad. 72, and by Lord Manners in *Leonard v. Leonard*, 2 Ball & B. 323. The conflict was, however, again renewed by Lord Cottenham in *Adams v. Fisher*, 3 M. & C. 526, a decision tending to a return to the earlier cases, and by Lord Lyndhurst in *Lancaster v. Evors*, 1 Phill. 349, who expressed himself strongly the other way. These cases were followed by *Swinborne v. Nelson*, 16 Beav. 416, in which Lord Romilly, master of the rolls, dissents from the ruling in *Adams v. Fisher*, and, upon a review of the authorities, lays down the doctrine broadly that a defendant, who submits to answer, must answer fully, and cannot escape by denying the complainant's title. The bill was for the infringement of a patent, and called for an account of all articles manufactured and sold by defendant under a particular name, the quantities thereof, the names and addresses of the persons to whom sold, and the prices. The defendants denied all infringement, and yet, upon exceptions, were required to answer these sweeping interrogations. The

master of the rolls repeated his ruling in *Clegg v. Edmondson*, 23 Beav. 125, where accounts were called for upon the basis of a partnership, and the partnership was denied. Both these decisions were appealed from, and the result is thus held by Lord Selborne, in delivering the opinion of the court in *Elmer v. Creasy*, L. R. 9 Ch. App. 73: "What really happened in the Court of Appeal was that the Lord Justices succeeded in putting pressure on the parties, so as to obtain their consent to reasonable terms for expediting the hearing, including such admissions for the purposes of that hearing as their lordships thought sufficient; and, upon these terms, the exceptions, or the appeals from the orders allowing them (I am not sure which, for these cases upon appeal are not reported), were ordered to stand over till the hearing. Vice-Chancellor Wood, in *De La Rue v. Dickinson*, 3 K. & J. 18 (an exactly similar case to *Swinborne v. Nelson*), thought himself warranted by these precedents in making an adverse order that exceptions for insufficiency should stand over to the hearing." In other words, to avoid the enforcement of the supposed general rule, which was found to work harshly in the particular cases, the lord justices "put pressure on the parties," whatever that may mean, by which they were mildly constrained to postpone their demands until the question of right was first adjudged. Lord Romilly adhered to his previous ruling in *Great Luxembourg Railway Company v. Magnay*, 23 Beav. 646; *Read v. Woodroffe*, 24 Beav. 421, and *Howe v. McKernan*, 30 Beav. 547. In the last of these cases, however, the defendant seems to have admitted the equity of the bill, and in the second his lordship refers to the appeals in the previous cases, the result of which was, he thinks, rather to confirm than shake his rulings, and undertakes to qualify the oppressive operation of those rulings. "If," he says, "I see that the substantial information given, though not strictly and technically, I have always discouraged exceptions." And, in answer to the objection of the difficulty of giving the discovery asked, which was searching and minute, he added: "If I find that the defendant has given a substantial answer, I shall not require of him

a minute and vexatious discovery." The result, it will be seen, is to hold to the rule in words, but to fritter it away by refusing to execute it at the discretion of the judge, or to avoid it by "pressure on the parties." In *Elmer v. Creasy*, L. R. 9 Ch. App. 69, the lord chancellor expressed the opinion, *arguendo*, that the rule that discovery, even if consequential on particular relief, could only be limited by demurrer or plea, "was in fact established, both on technical grounds and also because a full discovery of the details of the account might, in some cases, enable a plaintiff to take an immediate and final decree at the hearing, and because, if the discovery were postponed till a later stage, the plaintiff might run the risk of losing it altogether by death or other intervening accidents." The particular case was, however, a redemption suit, in which the defendant admitted the complainant's right to redeem, and only objected to giving the details of the account at that stage of the cause. The court, citing *Read v. Woodroffe*, add: "We are not now called upon to determine whether the defendant must, in answer to these interrogatories, set forth as full and detailed a statement of all the items of the account as he might be obliged to give under a decree for redemption. The court may be trusted to exercise a proper control over any attempt on the plaintiff's part to press for any such minuteness of discovery as would be either vexatious or unreasonable, as, indeed, it can do in every case in which it is satisfied that any kind of discovery is required vexatiously or oppressively." Another paragraph of his lordship's opinion is highly suggestive: "The principle expressed in Sir James Wigram's first proposition (*Wigr. on Discovery*, § 25), that 'the right of a plaintiff to discovery is, in all cases, confined to the question or questions in the case which, according to the pleadings and practice of the courts, is or are about to come on for trial,' might, indeed, have seemed to justify the postponement, until after the decree, of all discovery as to items of account, concerning which no special relief was prayed; especially if Lord Gifford was right in refusing (as he did in *Law v. Hunter*, 1 Russ. 100, and *Walker v. Woodward*, 1 Russ. 107) to receive

at the hearing, or to enter in the decree, as read, evidence as to such items."

In *Saull v. Browne*, L. R. 9 Ch. App. 364, the doctrine of *Elmer v. Creasy*, with its qualifications as therein expressed, was followed. But in the *Great Western Colliery Company v. Tucker*, heard during the same month and reported in the same volume, page 376, the court refused to require the defendant, whom the bill sought to charge as the complainant's agent, and who, by his answer, had denied the agency, to give the discovery of accounts called for by the bill. "The question," say the court, "is whether the relation of principal and agent existed between the parties. * * * This is exactly one of those cases referred to by the Lord Chancellor, in *Elmer v. Creasy*, where the court may be trusted to exercise a proper control over any attempt on the plaintiff's part to press for discovery which would be vexatious or unreasonable." Nevertheless, it must be conceded, the line of distinction is not very obvious, and the net result of the authorities seems to be that the whole matter is left to the discretion of the court. But, to use the words of Sir James Wigram in the work quoted by the lord chancellor in *Elmer v. Creasy*, "the practice which leaves to a judge the decision of a cause according to a discretion not reduced to rule is in principle a denial of the suitor's right." It is impossible to rely with confidence upon precedents which lead to such an unsatisfactory conclusion.

In the meantime the English judges undertook by the 38th order of the Orders in Chancery of 1841 (1 Ph. & Cr. 379) to remedy the evil in part. That rule provides that a defendant who answers may decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer. And the Supreme Court of the United States, by their Equity Rules of 1844, went further, and expressly provided that "the rule, that if a defendant submits to answer he shall fully answer to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery." Rule 39. Following this lead the Code of Tennessee,

§§ 4318, 4319, provides that a defendant need not demur or plead specially in any case except to the jurisdiction of the court, but may have all the benefit of a demurrer by relying thereon in his answer, and may incorporate all matters of defence in his answer.

The true key to the distinction between the discovery which the complainant is entitled to demand as of right, where the title of the complainant to relief is denied, and the discovery which he is not entitled to in such case, is struck by Sir James Wigram in the quotation made in *Elmer v. Creasy*. The right of the complainant to discovery, he says, is confined to the questions to be disposed of at the hearing on the merits, or, as he puts it elsewhere in his *Treatise on Points of Discovery*, §§ 91 and 244, is confined to the "plaintiff's case." He is not entitled to the discovery consequential on giving him the relief he seeks, but to the discovery which will aid him in obtaining that relief. If there is any part of the discovery sought which would tend to support "the plaintiff's case," and fix his right to the account sought, the complainant should have it in advance of the hearing. *Turney v. Bayley*, 4 De G. J. & S. 340. The discovery which merely goes to the details of the account, if ordered, may safely be left until the right to the account is adjudged. And this was precisely what Lord Gifford held in the two cases in *Russell*, cited by Lord Selborne in *Elmer v. Creasy*. The right of the complainant to a discovery, if he shows himself entitled thereto at the hearing, will not be prejudiced by the delay. He will, in that event, be in the position of a complainant to whose bill a false plea has been put in, and the issue thereon found in his favor. He may have an order that the defendant be examined on interrogatories, before the master, as to the matters in relation to which discovery is sought by the bill. *Astley v. Fountaine*, Rep. temp. Finch, 4; *Brownsword v. Edwards*, 2 Ves. 247; *Dows v. McMichael*, 2 Paige, 345.

W. F. COOPER.

NASHVILLE, TENN.

VII. BOOK REVIEWS.

THE LAW OF EVIDENCE IN CIVIL ISSUES. By FRANCIS WHARTON, LL.D. Two volumes. Philadelphia: Kay & Brother. 1877.

This is the last contribution of Mr. Wharton to legal literature. We think he has chosen his subject wisely. The changes in the law of evidence in recent years have been so great that a treatise exhibiting its actual state at the present day was much needed. The admission as witnesses, not merely of interested persons, but of parties, has worked a complete revolution in many of the rules pertaining to the laws of evidence. As the author truly says: "The first and most obvious result of this change is that a vast mass of rulings, embracing about one-sixth of the common-law cases on evidence, has become useless; while, in the shape of adjudications on the new statutes, we have a series of decisions which abound in important distinctions, and demand careful discussion. The results of the rehabilitating statutes are not confined to the branch of law with which they are immediately concerned; the whole system is more or less affected by the change. The doctrine of presumption, that of intent, that of fraud, and that of relevancy, are necessarily modified by so great an alteration, not merely in form, but in the principles of jurisprudence. The disuse of special pleadings and the almost unlimited liberty of amendment in civil issues have rendered practically obsolete, in such issues, the old decisions on variance. A work, therefore, that will faithfully give the law of evidence as it now exists must specifically discuss these modifications."

Mr. Wharton commences the discussion in his book by a preliminary consideration, in which he takes a general survey of the law of evidence, and then he immediately turns his attention to the question of relevancy, in which the doctrine relating to that subject is most ably expounded. Then follow chapters as to primariness as to documents, and their different kinds, including proof of marriage, copies of documents, certificates of officers, notaries' certificates, lost documents, documents held by opponents, and notice to produce documents. The chapter on hearsay

—under which head is discussed the general law relating to the subject, and also the testimony of deceased witnesses, the testimony of witnesses at former trials, testimony of sick or insane witnesses, depositions *in perpetuam memoriam*, declarations as to public rights, hearsay as to ancient facts, ancient documents, pedigree, narration to prove death and marriage, declarations of deceased persons, business entries of deceased persons, *res gestæ*, and declarations of state of mind—is very full and satisfactory. The question of judicial notice, with all the kindred questions properly ranged under that head, is examined, and the latest cases cited. From the burden of proof the author proceeds to witnesses, and here we find an elaborate consideration of the whole subject of procuring their attendance, the oath and its incidents, their competency, credibility, husband and wife, rules as to experts, examination, &c.

The law which now prevails alike in England and this country, abrogating the old common-law rule excluding interested parties, is thus vindicated. “The impolicy of such exclusion has been shown by Mr. Bentham with a quaint vigor which leaves little to be done by those who follow in the same line. We have already noticed the untruth of the assumption that a pecuniary interest is stronger than other interests; and the same reasoning that leads to the rejection of witnesses in one case of interest would justify their rejection in all other cases of interest. Yet if all kinds of interest should disqualify a witness, few witnesses could be sworn, for there are few witnesses who in some way are not interested in the case as to which they are called upon to testify. As, therefore, it is impossible to exclude all interested witnesses, the question arises why pecuniary interest alone should disqualify. Is pecuniary interest more intense than other forms of interest? It may be; but it is by no means the interest most likely to cause a witness to speak untruthfully. Men dealing with money are likely to be more exact in their words than those not accustomed so to deal. A business man knows that he has to pay such penalties for exaggeration that as a usual thing, he refrains from exaggeration. A business man who does not keep his word is disgraced, and ceases to be a business man. Such men hold truth peculiarly sacred, not simply from the love of truth, but because falsehood to them is ruin. In the common law, however, a business man with an interest of a penny in a case was excluded, while a witness who is bound to one of the parties by the most passionate ties was nevertheless a witness for such party. Who, for instance, is more likely to swear

another through thick and thin than an associate in a raid which strongly excites partisan sympathy? Nor does this spring necessarily from a conscious desire to prevent truth. In collision cases, for instance, all the witnesses may be honest; yet there are few collision cases, as has been already noticed, in which each witness does not swear with his ship. In riots, also, in which the responsibility of two warring factions is involved, it is notorious that the witnesses belonging to each faction swear together, even in respect to issues as to which it is impossible to give credit to the one body of witnesses without imputing perjury to the other body. Party spirit, to ascend to a higher line of illustrations, makes us unwilling to see, and, *a fortiori*, unwilling to narrate, that which is disadvantageous to those to whom we are attached; and even if our exceptions are not thus affected, between a willing and an unwilling witness, the practical difference is great. And stronger than party spirit are to be reckoned those strong family instincts which render the parent ready to make great sacrifices on behalf of the child, the child on behalf of the parent, the brother on behalf of the mother. Attachments such as these may take hold of weak minds and so work them as to make them unconscious of the falsity of their false statements, while the influence wrought by a pecuniary interest is usually one of which the witness himself is conscious; and he belongs to a class peculiarly susceptible to the difference between the true and the false, which is most exposed to ruin from speaking falsehood, and which is obliged to attach peculiar sanctity to truth. This line of reasoning, coupled with a growing consciousness that the truth, in judicial investigations, is best brought out by the exhibition of all relevant testimony, has led to the now universal statutory abrogation of the old rule excluding parties and persons having a pecuniary stake in the issue."

The exceptions in the statutes, where a suit is brought against an executor or administrator, in which case the surviving party is not permitted to testify, are fully considered, and all the adjudications collated, many of the opinions being abstracted at great length. At section 595 the law in reference to telegraph operators is examined, and it is stated that the established ruling now is that telegraph agents are bound to produce in court the originals of telegrams, or, if such originals be lost, to give secondary evidence of their contents.

The law in relation to the admissibility of pictures and photographs in evidence, which is now becoming of growing importance,

is learnedly discussed, and several cases of great interest referred to.

The chapters on judgments, statute of frauds, documents, wills and contracts, modified by parol and admissions, are the most full and complete that are to be found in any work on evidence. The concluding chapter, on presumptions in all their various kinds, is an exhaustive review of the whole subject.

The work covers the whole ground of the law of evidence applicable to civil issues, and will be found of great value in practice. It is up with the times and brings down the law to the very latest period. The notes are elaborate, and the citation of authorities is abundant. The authorities to support the text are not confined to a few of the states, as is the habit with some text-writers, but the cases are taken from all.

In answer to the objection that might be taken to the redundancy of the authorities cited, the author says in his preface "If this be excepted to, I might reply that it would have been far easier to have cited only leading cases from what might be called leading states. This course I once pursued; but the changes that have occurred since I published my first law-book have admonished me that neither leading cases nor leading states can be relied on as permanently retaining their rank. Several American states which, twenty years ago, had only territorial courts, now take a justly authoritative standing in our jurisprudence; and many decisions which, twenty years ago, were leading, have now become overruled, or have become obsolete. I have, therefore, on each point cited, as far as I could collect them, the rulings, no matter how obscure, of each of our American states, no matter how recent its establishment."

In this the author has acted wisely. He has furnished the student all the means and sources of investigation, and he will receive the thanks of the profession for it. The work is well written, and for terseness, condensation, and compactness is superior to any of the author's previous productions; it is worthy of commendation, and we are greatly mistaken if it does not soon attain a high rank.

D. W.

POLITICAL AND CONSTITUTIONAL LAW OF THE UNITED STATES OF AMERICA. By WILLIAM O. BATEMAN, Counsellor at Law. St. Louis: G. I. Jones & Co. 1876.

The volume before us contains 386 closely and well-printed

ges, and is devoted to a critical examination of the origin, construction, and tendencies of the fundamental principles of the federal government. The founders of that government had sufficient reasons for avoiding anarchy and centralization with equal care and jealousy. The awkward and blundering tyranny of George I. had rendered them distrustful of power concentrated in one or a few hands; the weakness and inefficiency of the articles of confederation had brought prominently into view the impotence of a government based in the main on moral suasion, and a vague trust that all men would spontaneously do what they ought to do. It was a day of compromises all round. Not only was it needful to make a good constitution, but it was also requisite that the constitution should be such as would probably be adopted. It was necessary to conciliate the suffrages on which its existence, unless it is a pure abstraction, would inexorably depend. When it was once reduced to form it failed to create any general enthusiasm. There existed a generation of men who had seen much; had seen many things rise up and depart; had seen how everywhere the inevitable commonplace quietly elbows aside the fears and hopes of men—all their day dreams and night dreams—and gives to all human affairs, when the tragic elements of life are for a moment sunk out of sight, the aspect of a comedy, which, in the long run, renders enthusiasm somewhat timid. There had been a period of eager enthusiasm; but it had been followed by a period of lethargy. Harder than the task of overcoming opposition was the task of overcoming indifference. Some men of marked ability supported the constitution on the expressed and sole ground that "it was better than nothing." The vast amount of judicial interpretation which it has required and received shows that the instrument was susceptible of many constructions on almost every point. Doubts were encamped on the frontier of every proposition. Those who favored its adoption gave, not unfrequently, opposite and inconsistent reasons for their action; and even hostile factions assisted each other in the general obscurity. The constitution did not quite mean all things to all men, but men gave to it different meanings. To the Federalist it was to be the guaranty of a strong government; to the friend of state sovereignty it was to be the bulwark of the immaculate rights of the states. The issue was that after it had been successfully put through, and it was beheld in its practical operation and effects, many were ready to cry out that they had been cheated and deceived. It would be hard to say

which side made the loudest and longest lamentation. There succeeded a degree of political animosity and party ran which has rarely been exceeded. It would be a great mistake suppose that these were made up only of sound and passion. The polemics of the time were of an unusually intellectual type. The disputants dealt with the most abstruse questions which can reach have a vast, continuing, and formidable relationship with the problem of human happiness. The annals of all time were closely scanned. The intense keen atmosphere of a debate that reached every household, involving the nature of the government to which the destinies of the people had been committed, nourished a race of men remarkable for their intellectual stature.

Of these many were found on the bench, as well as in the forum and in the legislative halls. It was for the bench to bring order out of confusion, to solve the doubts by which the controversy was fed. Others assisted in the work; but the bench had the casting vote. Doubtless the bench sometimes read the constitution by the light of after events; and sometimes, in a spirit of filial pity, it may have ascribed to the founders of the republic a foresight which they, being human, hardly possessed. Even now these judicial utterances are sometimes criticised in a temper which would seem to indicate that nothing ever wholly dies. But whatever difference of opinion may exist as to the judicial interpretation that now forms so large a part of the constitution as we know it, we may congratulate ourselves that tribunals of exceptionally great and undefined powers, subject indeed to no certain control, never ventured upon anything that could fairly be called revolutionary in its character.

The discussion as to centralization or diffusion of power is one that is continually rife under every form of government that permits discussion on political topics. In the formation of the federal government a great anxiety was manifested to steer cautiously between the two extremes. The federal government was to be one of conceded powers only; but the federal courts were to be the judges, in the last instance, of the extent of the powers thus granted. Those who favored a strongly centralized government were willing to rest their case, in this respect, on the known astuteness of the judicial mind—always uncommonly developed in matters pertaining to jurisdiction—and to the corporate spirit of a detached and separate body of jurists.

In this vacillating world nothing has been found to be more diffi-

ult than the task of preserving an equilibrium of forces. When very surrounding medium is fluctuating, the difficulty is increased. We shall hardly ever behold a ship under a full pressure of steam kept long stationary in mid-ocean, being detained by a strong head wind. The very fact that the federal government is the ultimate judge of its own powers, having dominion, not only over things known and specified, but also over the twilight boundary of doubt, always existing, though always receding, must naturally tend to enlarge its sphere and agencies of action. The check on this tendency does not act with any very great precision. The fancied antagonism between the states and the federal government has only a fitful and uncertain existence. If a majority of the states wish to accomplish any end, they will readily avail themselves of the federal machinery for the purpose of attaining it. In doing so they run the risk of strengthening a temporary cause by the loss of permanent power.

By a grand piece of good luck there is no estoppel in politics. In the early part of the reign of James II. the prevailing party sought, with much fervor, the doctrines of divine right and unlimited obedience. It was mentioned with a good deal of unction that it was precisely in the reign of Nero, the most arbitrary and bloodthirsty of all rulers, that St. Paul recommended to his disciples that they should be obedient to those in authority. But, by and by, when the liberties of England were fast disappearing under the sway of the last king of the house of Stuart, these sentiments likewise disappeared. It was found that the language of St. Paul was that of a period of ease or of a period of despair; and that it was not intended for universal application. In the growing darkness of the times the everlasting stars came out. England was saved by the practical good sense of her people; and this, in the end, is perhaps the only effectual check against the abuse of power. It would seem that neither individuals nor nations hold their destiny by any better or more secure tenure. When that fails, constitutions become mere objects of derision.

It has so happened that most of the recent works on the federal constitution have manifested a disposition to give a liberal and, as some might think, an exorbitantly favorable construction of the grants of power to the federal government. The present work is written in a very different spirit. The author conceives that power is fast slipping away from the states, and that if the current is not checked by a timely reaction, the states will eventually subside

into mere provinces, destitute of all power for good and every claim to respect. If there is anything extreme in the views presented, they may possibly act as an antidote to much that has gone before. The author has made a very critical and elaborate estimate of the constitution of the United States, and of the methods of construction, political and judicial, that have been applied to it. He has dwelt particularly on the tendencies of the various amendments that have been adopted. He points out certain rocks on which the ship of state may be wrecked. His presentation of the subject is at once attractive and forcible, and his book recommends itself to every one who desires to become better acquainted with the theories of our government and its practical workings. The controversy of which it treats is an old one, and is not likely to become obsolete at an early day. As to the real merits of the case, this is no place to pass upon them. We can only say *non nostrum*, and leave them to the judgment of the intelligent and patriotic reader.

U. M. R.

A TREATISE ON THE LAW AND PRACTICE OF VOLUNTARY ASSIGNMENTS FOR THE BENEFIT OF CREDITORS: Adapted to the Laws of the Various States: With an Appendix of Forms. By ALEXANDER M. BURRILL, Author of a Law Dictionary and Glossary, a Treatise on Circumstantial Evidence, and a Treatise on Practice, etc. Third Edition. Revised and Enlarged by JAMES L. BISHOP, Counsellor at Law. New York: Baker, Voorhis & Co. 1877.

But few law books were ever published in this country showing better faith, or a more careful examination of the cases cited, than Mr. Burrill's Treatise on Voluntary Assignments. It has been for twenty-four years one of the standards of professional learning, and has been so fully approved, both by the bench and bar, that any lengthy encomium of its merit would be out of place and out of season. Since the last edition preceding the present was given to the world, the laws relating to the subject-matter of the work have undergone extensive changes and modifications. The present edition has been designed to meet these changes, and to bring the authorities and the statutes before the reader so as to render plain the present state of the law. Many new statutes have been passed which have received judicial interpretation, and more than a thousand new cases have been reported. The bankrupt act, in particular, has extensively affected the whole topic of voluntary

assignments. Many former statutes have been repealed. Under these altered circumstances the former edition, issued more than twenty years ago, could not be relied on for an exhibition of the law as it now stands. The need of a new edition of the work was, therefore, urgent. Far better, we think, than any new work would probably be, is a new edition of a book that has won the confidence of the profession, and which could be rendered a faithful representation of all the changes which time and experience have suggested to law-makers and to the courts. The work of Mr. Burrill was well done, and required no further alteration than that which would display clearly whatever is new on the subject.

We have examined the present edition with some care in order to ascertain how far the editor has met the requirements of duty in editing well a good book, and we think that the reader will have cause to congratulate himself on the manner in which the labor has been done. The editor seems to have added all the later cases in a way that detracts nothing from the clearness of the outline of the original work. In one respect we feel some regret. The editor has not only added notes in explanation of the text, but he has altered the text in order to make the work appear as if it might have been wholly written yesterday. In doing so the editor has not indicated what part of the text belonged to the original work, and what part has been added; so that the reader cannot tell, without a comparison of the present with previous editions, what part of the text was written by the author, or what part we may owe to the editor. Had the editorial work been badly done, this would be perfectly inexcusable. As to how far this course may be rendered excusable by care, exactness, and excellence, in the manner in which the editor has accomplished his task, is a question concerning which there may be much difference of opinion. If such an excuse is ever admissible, we grant that it may be successfully pleaded in this instance.

The editor says that "it was the desire of the editor to distinguish, in some suitable manner, the additions and alterations which have been made in this edition, lest any error or failure on his part should seem to mar the well-deserved reputation of the distinguished author for thorough accuracy and reliability. But the changes were necessarily so numerous, and of such a character, that no acceptable plan suggested itself, and the purpose was reluctantly abandoned."

U. M. R.

WISCONSIN REPORTS. Vol. XL. Chicago: Callaghan & Co. 1877.

From the beginning the supreme court of Wisconsin has held a highly respectable position among our chief judicatures—better than the average—and this has, doubtless, been owing chiefly to the determination of the bar of that state to keep the election of judges out of party politics. The judiciary is elective; but the first chief justice was Mr. Whiton, a decided Whig, chosen when the state was strongly democratic, and the present chief justice is Mr. Ryan, an out-spoken Democrat, chosen by the Republicans. Though elected by the people, the judges have, in effect, been selected by the leading members of the bar, who, above all others, know the importance of good judges and the results that so often spring from the selection of bad ones.

The case in this volume which has attracted most attention is *The State ex rel. Drake v. Doyle*, Secretary of State, which was an application for a *mandamus* to compel the secretary to revoke the license to issue policies in the state, given the Continental Insurance Company of New York.

In order to save the citizens of the state, taking insurance in foreign companies, from the inconvenience and expense of prosecuting their demands in the federal courts, sitting at points distant from the residence of most of them, with appellate jurisdiction at Washington instead of the state capital, which, in many cases, would be more burdensome than to surrender the demand without prosecution; and more especially in order to secure a uniform course of decisions upon the law of insurance, applicable alike to foreign and domestic companies, the legislature had provided, by law, as a condition to granting license to foreign companies to issue policies within the state, that they should file a written agreement not to remove actions on its policies from state to federal courts. The Continental Insurance Company had been sued in the state courts; and, disregarding the agreement it had filed as a condition to obtaining license, had removed the cause to the federal court. The case of *Insurance Company v. Morse* had been heard in both the supreme court of the state and in that of the United States. The former court (30 Wis. 496) had sustained the validity of the act and the binding obligation of the agreement; the latter, on the other hand, decided that the law was unconstitutional and the agreement void (20 Wall. 459.) The secretary of state thereafter, following this opinion, issued regular license to this company without requiring the agreement provided for in the

Wisconsin statute. The case under consideration, *The State v. Doyle*, was an application for a *mandamus* upon the secretary, commanding him to revoke the license as having been issued contrary to the state enactment. Thus the question was directly raised whether this act, after the decision in *Insurance Company v. Morse*, possessed any binding force.

The opinion in *The State v. Doyle*, delivered by Ryan, C. J., is very elaborate, and most of it is clear and able. It analyzes the opinion of Justice Hunt in *Insurance Company v. Morse*, in which the majority of the judges of the Supreme Court of the United States had concurred; undertakes to separate the decision from the *dicta*, bows to the decision, saying: "It is our duty and pleasure to submit to the decision of the federal court on a point unquestionably within its final jurisdiction," but declines to acknowledge the unconstitutionality of the Wisconsin statute, as that question was not before the court. "The sole question, therefore, before the federal court," says the chief justice, "upon the writ of error in *Insurance Company v. Morse* was whether the right of the insurance company to remove the cause to the federal court remained, notwithstanding the agreement. Upon that point only is the judgment in that case conclusive in this court; upon that point only is the opinion of that court authoritative with this.

* * * The opinion of the majority, delivered by Mr. Justice Hunt, applies to the agreement of the insurance company—not to remove the cause to a federal court—the general and familiar rule that parties cannot, by contract, oust the ordinary courts of their jurisdiction. * * * The opinion proceeds to enquire whether the agreement gains validity from the statute of the state requiring it, and holds that it does not, because the right of removal is given by the constitution and laws of the United States. And, therefore, the majority of that court reversed the judgment of this court on the ground that the petition to remove the cause to the federal court had ousted the jurisdiction of the state court.

"So far the opinion deals with the question involved in the case. Having so held, the opinion had exhausted the question before the court; had exhausted the appellate jurisdiction to this court; had exhausted its concern with the statute of the state. In its own view of the question before it the only concern of that court with the statute of the state was whether it could operate to take the agreement out of the general rule held to be applicable to it. The agreement was directly before the court; the statute, at best, was

only before the court collaterally. * * * With the domestic policy of the statute, with the right of the state to refuse license to insurance companies refusing to make the agreement, that court had no concern. * * *

"The statute of the state does not assume to prohibit insurance companies taking license under it from removing actions on its policies from state to federal courts. It only provides that no insurance company shall be licensed under it which shall not file an agreement not to remove them. So that the question in *Insurance Company v. Morse* was not whether the statute was in violation of the right of removal, but whether the voluntary agreement of the insurance company was obligatory upon it. The only question upon the statute, before the court, was whether it could operate to give validity to the agreement held to be otherwise invalid. And it is sufficiently plain that the agreement, and the validity of the statute requiring the agreement, are entirely distinct questions. The invalidity of the agreement has been determined by the court of last resort on the subject, but the statute remains. And we take it that no provision in the constitution, laws, or treaties of the United States is violated by a statute of the state prohibiting the license of the state to foreign corporations to do business within it upon any condition whatever. The right of the state to refuse such license is absolute; and, being absolute, it may be at its absolute discretion, not to be questioned or abridged anywhere, under any pretence. It was within the appellate jurisdiction of the federal court to refuse effect to the agreement ousting the jurisdiction of the federal courts, but it is not within its jurisdiction to hold foreign insurance companies entitled to license without the agreement. It can hold the insurance company not bound by the agreement when made as repugnant to the constitution and laws of the United States, but it cannot excuse the agreement as a condition precedent to license under the state statute. So far the statute stands outside the appellate jurisdiction to this court, raising a pure question of state policy and economy in a matter within the absolute pleasure of the state. Conceding the invalidity of the agreement, the statute still prohibits license within the mere discretion of the state without the agreement, and the statutory license cannot issue without it. In authorizing voluntary licenses with absolute right to annex any condition to them, the state may exact agreements morally, although not legally, binding on the licensees."

We have thus given a copious extract from the opinion of the chief justice, showing the reasoning by which the court came to the conclusion that, notwithstanding the agreement not to remove cases to the federal courts, which had been made by the insurance company as a condition to obtaining license to issue policies in the state, it could not operate to deprive the company of its legal right not to remove them; still the statute of the state was so far obligatory that no license could legally issue without such agreement as made. The conclusion, then, was that the secretary of state, in dispensing with the agreement, had improperly granted the license for the coming year, and a *mandamus* was issued commanding him to revoke it.

Another question arose in the case, and we have only room to briefly refer to it. Strangely enough the United States circuit court, apparently without hearing, had issued an injunction against the secretary of state, forbidding him from revoking the license. The jurisdiction of this court, in the premises, is reviewed at length; the history of the early controversies between the federal courts and some of the states is given in some detail, and, in so doing, the chief justice is less happy than in other parts of the opinion. The action of the United States circuit court was certainly very strange, if not a usurpation of power, and it might be well enough to disregard it; but a history of alleged usurpations of the Supreme Court of the United States in past generations was hardly called for. It will do for politicians, and even for statesmen like Mr. Jefferson and Mr. Calhoun, to criticize the decisions of this court—decisions upon which is based the very existence of the Union as a power able to answer its ends; but further than is necessary to the conclusions to which a court may arrive, it is not judicial, is out of place, in a judge. Mr. Calhoun, as we have said, might well do it; for he was the able apostle of a new dispensation, and, after his quarrel with General Jackson and his friends, labored for the rest of his life—and with signal ability—to inculcate constitutional doctrines wholly at variance with those uniformly recognized and enforced by this court. And Mr. Jefferson so cordially hated Mr. Marshall—could so little appreciate the stern logic of his judicial opinions—that he could find no better terms in which to express his views of the court over which Marshall presided than by describing it as the sapper and miner of the constitution. There was nothing judicial either in his mental constitution or habits of thinking. Nevertheless, while he was presi-

dent, for the adoption of measures that most distinguish his administration, he found it necessary to tread upon the verge of constitutional powers, to exercise those more indefensible, upon his theory of the constitution, than many which, in the administrations of Washington and Adams, he had denounced as infractions of that instrument. Notwithstanding this, and the fact that he denounced as treason every attempt to nullify federal measures and withstand federal authority by his opponents, he was in theory a nullifier. With less courage and less ability than Mr. Calhoun, he probably would not have proceeded to the extremity of actual nullification had the quarrel among the Federalists failed to place him in power; yet the position taken by him in one of the Kentucky resolutions of '98—to wit, that each state has the power to judge as to infractions of the federal constitution and as to the means of redress, if not *brutum fulmen*—could mean nothing else than nullification. He, of course, would be the enemy of the federal courts. Yet those who administer our laws, however much they may admire his benevolent theories and his many excellent qualities, should remember the difference in their positions and responsibilities.

These remarks are not made because we think there has been a great departure from judicial propriety in the opinion before us, if any at all, but because, in seeming to go further than was necessary in criticizing the course of past federal decisions, the excellent court, of which Judge Ryan is an ornament, seems to follow a fashion which is rife among shallow politicians and impracticable theorists, of decrying and seeking to break down the influence of the greatest, the purest, the most careful and painstaking court in the world—a court without which a permanent, federal, republican government could not exist among us.

It should be noted that an appeal was taken from the injunction granted by the federal court, and the Supreme Court of the United States reversed the decision below and dissolved the injunction, taking the same grounds in regard to the power of the state to impose any conditions it saw fit upon a license given to a foreign corporation to do business within its limits, as that of the Wisconsin Supreme Court. Nothing else could be expected of that tribunal, and there was no real ground for dreading the collision between the two courts that seemed to be threatened. The federal Supreme Court, for the last ten or fifteen years, has been very chary in assuming jurisdiction in doubtful cases, has been more inclined to limit than to enlarge its own powers, and it is the last

dy from which those who are so frightened with the spectre of consolidation have anything to fear. Composed of a body of able and mature lawyers, trained from the cradle to look upon the national government as one of limited powers, although supreme in the exercise of those powers; no longer trembling in the shadow of an imperious and despotic interest, before which judges and laymen were alike compelled to bow; having thus become independent of any control higher than the law, this court will, more fully than ever before, become the great balance-wheel of the republic. No idol-worship is demanded; able and patriotic men will differ as to its conclusions; that it will sometimes blunder, necessarily results from the fact that judges are but men, and that human infirmity marks all human institutions, yet we have everything to hope and little to fear from its influence upon our institutions. Just and candid criticism should always be welcomed, but carping and general denunciation is as unpatriotic as it is undignified.

B.

TENNESSEE REPORTS. Vol. XII. Reports of Cases Argued and Determined in the Supreme Court of Tennessee. By GEORGE S. YERGER. Volume IV. A New Edition, with Notes and References. By WILLIAM FRIERSON COOPER, Chancellor of the Seventh Chancery District. St. Louis: G. I. Jones & Co. 1876.

The service rendered to the profession by the faithful editor and annotator of an old and favorite text-book, or a familiar and much-used volume of reports, is no small service.

Though men are apt to ascribe the most credit to the writer of the volume, and though even a poor treatise may have a certain measure of success and renown, if its subject be novel and attractive, yet it often happens that the revision of an old work is far more useful to the profession, and more deserving of their thanks. It is a matter of especial congratulation when so eminent a jurist as Chancellor Cooper of Tennessee consents to undertake the editing and annotating of a series of old reports. The work bestowed by him upon the new issue of the Tennessee Reports is of a character that can only add to a reputation already high and well-established. 4th Yerger, the volume now before us, may be taken as a fair example, though we cannot say that it excels the previous ones of this edition. Those not acquainted with Judge Cooper's work as an editor of these reports will find, on examination, that he has rewritten all the head-notes, and has added to them notes

showing all important cases, in either the earlier or the later Tennessee Reports, that accord with, differ from, or are in any direct manner affected by, the principal case. The faithfulness with which this work is done has elicited many encomiums from the bar of Tennessee. The reviewer takes pleasure in testifying that more than one practitioner, after finishing what he supposed was an exhaustive examination of some knotty point, has found his brief supplemented by some citation in Judge Cooper's notes, of a case till then overlooked by the brief-maker. It has been difficult to learn the law settled by the decisions in Yerger's Reports—so defective and incomplete were the head-notes. But there are syllabus-makers, and—syllabus-makers. It is a high art to construct a proper syllabus, and the illustrious Yerger is not the only celebrated lawyer who did not possess this art in a high degree. Instances of Judge Cooper's improvement upon the original head-notes will illustrate his own ability in this respect. Thus, in *Johnston v. Searcy*, p. 182, the original reporter's note is: "Mere delay in calling on the principal will not discharge the surety," with a statement added of the case in judgment, being that of an endorser who had waived demand and notice. The succinct presentation of all this in the new edition is: "*Endorser—Delay in calling on maker.* Mere delay in calling on the maker of a note for payment will not release an endorser who has waived demand and notice." Taking at random another case, we find that, under *Hawkins v. Walker*, p. 188, the old report gives us this syllabus: "A received money as agent of B, and for B's own use, and died. An action of assumpsit was instituted, four years after the receipt of the money, against A's administrator, who pleaded the act of limitations of three years. No demand of the money had been made of A or his administrator. Held, that the action was barred." This is thus condensed by Judge Cooper: "*Limitation of actions—Principal and agent—Money collected.* The time to form the bar of the statute of limitations begins to run from the time money is collected by an agent for his principal, and not from demand made by the principal." These examples will exhibit the pains taken by the learned editor in shaping his head-notes. His absolute fidelity to the letter of the decision is illustrated in *Matthews v. Armstrong*, p. 181, where his syllabus is: "A variance between the declaration and writ, in setting out the debt, is not fatal," omitting the recital interpolated by the original reporter into *his* syllabus, that "the sum

anded in the declaration was more than that laid in the writ; "not referred to in the opinion, and which may perhaps have been of importance in the case, but which should have been stated in the report of facts, if at all, and which was out of place in theabus. Another like instance is found under *Davis v. Tisdale*, 173. There are several such in this volume.

Nor are these the only styles of amendments made by the editor in the new edition. *Guion v. Bradley Academy*, p. 232, receives an entirely new head-note: "Nothing is better settled than that the courts can make no other exceptions to the enacting and barring clauses of the statute of limitations but such as are made by the legislature," the importance of which note is evident from the fact that the case was cited, as authority for this proposition, in a later case in 1 Heisk. In *Perry v. Smith*, p. 323, and in many other cases, important additions are made to the old head-notes. In *Earn v. Crutcher*, p. 461, Judge Cooper's head-note calls attention to the point expressly decided, that "the appearance and answer of a garnishee are a waiver of any defect in the summons," the office being held to be ended as soon as the garnishee appears and submits to answer. This adjudication was wholly overlooked by the original reporter; but its importance is manifest from the fact that it stands alone as an authority on that point, having remained unchallenged for forty-four years. This one correction proves the value of, and justifies the issuance of, the revised edition of the Yerger Reports. We shall have, when the revision is complete, perfection in the head-notes instead of imperfection and frequent errors and omissions.

Judge Cooper's work as editor also includes frequent and useful foot-notes where decisions, statutes, and legal history, germane to the principal case, are briefly adverted to. Suffice it, in conclusion, to say few reporters are more exact, pains-taking, faithful, or full in their reports. But one additional feature has been suggested as desirable in the Cooper revision—and that has, in its turn, been suggested by the already full style of Chancellor Cooper's reporting—it is, that a table of "cases cited" would prove of still further assistance to the brief-maker in following the abundant clues already furnished in the learned editor's notes of parallel cases.

At the risk of causing the faces of our genial publishers to suffuse with blushes, the reviewer must call attention to the letter-press of

these volumes as admirable in dress, most gratefully pleasing to the eye, and fairly rivalling the best typography of the eastern publishers. F.

REPORTS OF CASES DECIDED IN THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES FOR THE NINTH CIRCUIT. Reported by L. S. B. SAWYER, Counsellor at Law. Vol. III. San Francisco: A. L. Brancroft & Co. 1877.

This volume brings down the series of decisions in the Ninth Circuit, comprising the districts of California, Oregon, and Nevada from March, 1874, until November, 1876. It contains nine decisions by Judge Field, twenty by Judge Sawyer, thirty by Judge Deady, nineteen by Judge Hoffman, and nine by Judge Hillyer. Twenty of the decisions pertain to admiralty jurisdiction and practice, fourteen to bankruptcy, three to revenue, four to patent law; eight have reference to land titles. Questions of civil rights, taxation, Indian affairs, copyright, removal of causes, and practice make up the rest of the volume.

We find fewer departures from the law, as laid down in the eastern and central states, in this, than were noticed in the earlier volumes of the series. The opinions are carefully considered, and the authorities, particularly of the United States Supreme and Circuit Courts, exhaustively cited. This is indicative, not only of judge's intent upon harmony in the administration of law throughout our vast domain, but of a bar thoroughly fitted for its work and performing its full duty by intelligently and industriously arguing its cases.

A court, before whom a cause has been argued by counsel, has no right to presume that each party has presented for its consideration all the respectable authority which, if applicable to the cause, should influence its judgment.

That this was done in the case of *Kielly v. Belcher S. M. Co.* 437, on the question of the liability of a master for injuries caused by one fellow-servant to another, is plainly apparent. The same remark applies to the elaborately considered opinion of Mr. Justice Field, in *Galpin v. Page*, 93, concerning the relation of national courts to state courts, and service by publication; and to the terse decision of Judge Deady, in the "*Eliza Ladd*," which determines that a contract to furnish a ship with the means of propulsion, after she is launched and afloat, is *not* a contract to build a ship, and is a maritime contract.

It is interesting to notice that Mr. Justice Field, in 1874, *In re Fong*, 144, had reached the same conclusion as to the unconstitutionality of the California statute in restraint of Chinese immigration, which was subsequently announced in the masterly opinion of Mr. Justice Miller, as reported in the case of *Chi Lung v. Freeman*, 92 U. S. 275.

Judge Sawyer, *In re Oregon Bulletin Printing and Publishing Co.*, 614, reverses Judge Deady's decision, in 13 N. B. R. 200, as to the construction of the amendatory bankrupt act of 1874, mainly relying upon Judge Dillon's decision *In re Leavenworth Savings Bank*, cited from 3 C. L. J. 207. This harmonizes the decisions throughout the country upon this point, and furnishes an instance of the benefit, in this regard, of our legal periodicals, which furnish accurate reports of cases in advance of their publication in the regular series of reports.

The index of this volume is unusually complete, well arranged and supplied with cross-references. Its head-lines, at top of page, distinguish between the statement of the case and the opinion of the court, adding also the name of the judge deciding the cause. In most cases the date of the decision, a very important matter, is given. In its typographical and mechanical make-up it is a standing reproach to our Missouri Reports. In every respect the volume is entitled to a place on the shelves with the California State Reports, which comprise decisions of which the profession may well be proud.

With becoming diffidence we would suggest, however, that the very charges of Mr. Justice Hoffman, in *United States v. Cargo of Sugar*, 46, of Mr. Justice Hillyer, in *United States v. Waitz*, 474, and of Mr. Justice Deady, in *United States v. Montgomery*, 545, might well have been omitted from this volume. They present no novel or unusual questions of law or practice. Our reports multiply too rapidly for space to be thus wasted. We can find sections 14 and 215 of 1 Greenleaf on Evidence without looking for them on page 551 of this volume, printed *verbatim*, with proper credit of course, as a part of Judge Deady's charge. In the second volume of this series nineteen pages were used for a similar purpose, and the oaths administered to the foreman and his fellows of the grand jury printed in full. This looks too much like padding on the part of the reporter. Be merciful, gentlemen reporters! Our volumes come thick and fast enough without resorting to form-books for material with which to fill them.

A.

A TREATISE ON CRIMES AND MISDEMEANORS. By SIR WILLIAM OLDHAM RUSSELL, Knt., late Chief Justice of Bengal. CHARLES SPRENGEL GREAVES, Esq., one of Her Majesty's counsellors. Ninth American, from the fourth London, Edition, with Notes and References contained in the former Editions, and with Additional Notes and References to English and American decisions. By GEORGE SHARSWOOD, LL.D. In three volumes. Philadelphia: T. & J. W. Johnson & Co. 1877.

The ninth American, from the fourth London, edition of Russell on Crimes is now before us. The edition itself is excellent; and that can reasonably be required of publishers has been done by them. They have given us, in their work and in the materials used, an example of honest, faithful book-making. The work embraces three large volumes, the largest size of law page. Each page is literally crowded with clearly printed matter. The paper is white and firm. Each volume contains over a thousand pages. They are substantially bound in the very best of law sheep. In short, the work speaks commendably of the enterprise and liberality of the publishers.

Russell on Crimes has been a standard work, both in England and this country, for more than half a century. It has commended itself to practitioners in every part of the United States for its fullness and accuracy. Mr. Hoffman, in his celebrated "Course of Legal Study," published many years ago, said of it that "the criminal jurisprudence of England is nowhere treated in so inviting a manner as in this work." Not only is each subject of criminal law, with the exception of high treason, discussed in an inviting manner, but with a fullness of illustration and accuracy of statement to be found in no other single work. With regard to high treason the author says: "The crime of high treason was not originally included in the plan of this work, on account of the great additional space which the proper discussion of that important subject would have occupied, and because prosecutions for this crime—happily not frequent—are always so conducted as to give sufficient time to consult the highest authorities." We can congratulate ourselves that in this country we have even less occasion for a practical knowledge of high treason than in England. If we can pass through such a war as that of the late great rebellion without a single trial for high treason, it is difficult to conceive of an occasion for such a prosecution in the United States.

This has always been a fortunate work. The author was a man

great ability, learning, industry, clearness of thought, and power of statement ; all these qualities were impressed upon the work in the first instance, and made it a favorite with the profession from the start, while each successive edition has shown it greatly elaborated and improved.

The fourth London edition, from which the present American edition is reprinted, was prepared by Charles Sprengel Greaves, Esq., than whom no abler or better qualified editor could be found in England. His learning and ability were of that commanding order that made him well known in this country, and when the commissioners who had charge of the completion of the new code of criminal law for the state of New York had that work in hand they called upon him for assistance, which he rendered with such efficiency as to draw from the commissioners the most flattering acknowledgments of the value of his services in helping to complete that great work.

Mr. Greaves, in preparing the fourth London edition of this work, observed the system adopted by the author, and followed the same as nearly as could be, and the statutes and cases were introduced in a manner similar to that which the author himself pursued in preparing the second edition. To follow out this plan required the editor to give a correct statement of the statute at the time the edition was prepared, and of the cases which have been decided under it, accompanied with a reference to repealed statutes, and giving the decisions under those, so far as they have a bearing upon the existing statutes, or where they turn upon a general principle, or illustrate the canons of construction. This necessitated an immense amount of labor at the hands of Mr. Greaves, which he performed most worthily and with signal success. We have had occasion, within the last few years, to refer quite often to the cases cited by the editor, as illustrating and supporting the text and the marginal notes, and in no single instance have we found an erroneous or unwarranted citation. We think this no slight commendation of the work. It saves much time and labor to have pointed out at once the authorities sought, and it gives confidence and faith in the honesty of the whole work. It has become too much the custom of some editors, of late, to cite a long array of cases as supporting the text, or the notes, when in fact they do no such thing.

A criticism which is sometimes made, that this work contains too much English statutory matter, is without force even in this

country. Most of the statutes cited and referred to, in substance, form the body of our criminal law, as it exists to-day in every state in the Union ; and the decisions in England, under those statutes, give us a clear comprehension, and correct interpretation, of our own.

The American editors of this work have always been able, learned, and faithful men. The first American edition was by Mr. Davis, solicitor-general of Massachusetts ; and a few years after it was again very ably edited by Theron Metcalf, Esq., on the basis of Solicitor Davis', and of the second London, edition. But Judge Sharswood has been so long the American editor of the work as almost to exclude the memory of any other. It would be high praise of any law book to say that it had received the good opinion of this eminent jurist. But where, as in this case, the work has not only received his approbation, but his careful supervision, and the seal of his faithful work, as editor and commentator, for over forty years, we have the very highest approval of Russell on Crimes that Judge Sharswood can give. It may be said of Judge Sharswood that, though no man was more capable of writing original works, and achieving for himself a separate and independent renown, he contented himself in laboring to perfect the works of others. Possessed of talents and acquirements which made him great, he wished only to be useful. His editions of Blackstone, Starkie on Evidence, and the present work are monuments all to his ability, learning, and industry. Eminent as a judge, successful as a teacher and lecturer in the Law School of Pennsylvania University, he was also felicitous as a writer, and whatever he contributed by way of original matter was always favorably received and highly prized by the profession throughout the country. In his editorial work he was painstaking and reliable. In such labors no man in America stood higher. Whatever he did could be pronounced reliable without personal verification, as his notes and references in this work will abundantly prove. The American decisions are brought down, in this edition, to November, 1876.

The whole work is divided into six books, but space will not permit us to speak of each. As we have said before, the discussion of each particular subject contained in these books is exhaustive. The first book treats "of persons capable of committing crimes, of principals and accessories, and of indictable offences." And herein the question of *insanity* is discussed. The author states the law and gives abundant illustrations of it, as it has existed in England

the past and as it exists to-day. It is probable that no one subject of criminal jurisprudence has undergone more changes, in its administration, during the last half century than this. And yet the principle underlying the whole subject has not changed. It has always been an undeniable principle of criminal law that *intent* is an essential element in every crime, and a person destitute of the capacity to entertain a criminal intent cannot incur legal guilt. Yet in the administration of this department of law, this simple principle has too often been lost sight of. Uncertainty has arisen concerning certain supposed *tests* of insanity which judges have unsuccessfully tried to establish. They have failed because such *tests* were opposed to truth and nature. And it is with regard to these supposed tests of insanity that such great changes have taken place.

First there was the "wild beast" test. Thus, in the trial of Arnold, an undoubted lunatic, for shooting at Lord Onslow, in 1723, Mr. Justice Tracy said: "It is not every kind of frantic humor, or something unaccountable in man's actions, that points him out to be such a madman as is exempted from punishment; it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, *no more than an infant, than a brute or a wild beast*. Such a one is never the subject of punishment." This test was quietly abandoned, and the next knowledge *test* of insanity was made to consist in the power to distinguish right from wrong—not in relation to the particular act, but generally. This doctrine was laid down in the celebrated case of Bellingham, who was tried for the murder of Mr. Spencer Perceval, in 1812; a conviction took place, and the prisoner was executed. The law in that case was declared to be "upon the authority of the first of the first sages of the country, and upon the authority of the established law in all times, which has never been questioned, that, though a man might be incapable of conducting his own affairs, he may still be answerable for his criminal acts, *if he possess a mind capable of distinguishing right from wrong*."

This *test* seems to have been applied until about 1843, when one McNaughton shot and killed Mr. Drummond under the insane delusion that he was one of a number of persons whom he believed to be following him everywhere, blasting his character and making his life wretched. He was tried, and acquitted on the ground of insanity. Thereupon the House of Lords, participating in the public alarm and indignation which were occasioned by the acquit-

tal, propounded to the judges certain questions with regard to the law on the subject of insanity when it was set up as a defence in criminal actions, the object being to form an authoritative exposition of the law for the future guidance of courts. The answers of the judges to the questions thus put to them constitute the law of England as it has been applied since to the defence of insanity in criminal trials.

One of the most important answers to the questions asked was that, "to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing wrong." It will be noticed that the question of right and wrong in the abstract was here abandoned, being allowed quietly to go the way of the wild beast form of the knowledge-test; the question of right and wrong was put in reference to the *particular act* with which the accused was charged. Moreover, it was put in reference to the particular act at the *time* of committing it.

Dr. Maudsley says, of the answers of the English judges to the questions of the House of Lords, "that they are unanimously condemned by all physicians who have a practical knowledge of the insane." And the reason why any of these supposed tests are unsatisfactory and unwarranted is, as stated by Judge Ladd, in the very important case of the *State v. Jones*, 50 N. H. 369, that they are not law, but facts, and that it is "an interference with the province of the jury, and the enunciation of a proposition which, in its essence, is not law, and which could not, in any view, safely be given to the jury as a rule for their guidance, because, for aught we can know, it may be false in fact to lay down any so-called test of responsibility founded on a supposed knowledge of right and wrong."

For a long while after the English judges had given their answers to the House of Lords the courts of this country followed docilely in the wake of the English courts. But of late our courts have exhibited a disposition to emancipate themselves from an authority which they perceive to be founded on defective and erroneous views of insanity, and a desire to bring the law more into accordance with the results of scientific observation. The view taken by the most enlightened courts of this country is "that all symptoms and all tests of mental disease are purely matters of fact, to be

terminated by the jury"—the question for the jury being, was it the offspring or product of mental disease? Our courts recognize "that that cannot be a fact in law which is not a fact in science; that cannot be health in law which is disease in fact; and that it is unfortunate that courts should maintain a contest between science and the laws of nature upon a question of fact which is within the province of science and outside the domain of law." In this respect we believe our courts are in advance of those of England. And while in the text, and the notes by the English editor, we have a full statement of law as it has existed and now is in England, we have, also, in the American editor's notes and cases cited all the means of acquiring a full knowledge of the law as it is been and now is in this country.

We believe this to be one of the very best works on crimes ever published in England; and the purchaser of this edition of Russell on Crimes will secure more legal matter than is embraced in any three-volume work on the subject published in this country.

L.

UNITED STATES REPORTS. Vol. 93. Cases Argued and Adjudged in the Supreme Court, October Term, 1876. Reported by WILLIAM T. OTTO. Vol. III. Boston: Little, Brown, and Company. 1877.

To the other improvements which we have before noticed as having been introduced into the system of reporting the decisions of the United States Supreme Court, by Mr. Otto, he has now added that of promptness.

The present volume supplies us with a large proportion of the decisions made at the term which has lately, and almost contemporaneously with the appearance of the volume, adjourned. Many of these decisions have already appeared in the pages of the legal journals. But Mr. Otto's promptness in issuing his reports will necessarily tend to discourage the practice of printing these decisions in advance of their appearance in his pages. When he has succeeded in convincing the bar of his determination and ability to furnish them with his reports within a reasonable time after the filing of the opinions, the excuse and the necessity for any other very general publication of them will have passed away; and, except as to the more notable decisions, they will first appear in the regular reports. The reporter will thus find his increased faithfulness and diligence in reporting to redound to his pecuniary

advantage: We will not attempt to bestow proper encomium upon him for these merits; we will let "his works praise him."

We are so well satisfied that Mr. Otto has found it an easy and pleasant task thus to make his reports of more than ordinary usefulness and value to the profession, that we venture to suggest other improvements. It is not too early for Mr. Otto to give his readers, with each case, notes referring to other decisions upon kindred points in the previous reports of the same court. If these notes should be of equal brevity with those given in Curtis's Decisions, they would be of great service; but they might easily exhibit the latitude of Mr. Chancellor Cooper's notes to the revised Tennessee Reports. Again, a "table of cases cited, overruled, distinguished, and criticised" would be a most valuable feature of such a volume of reports. We conceive it to be our duty to encourage all reporters and legal text-writers to the highest perfection in book-making; and no volume of reports can be complete without the features here named. In the present accumulation of law books, and with the professional demands thereby engendered, we look to see all such improvements in book-making introduced as may serve to lighten the labors of the practitioner. It will not be many years before the features above suggested will be considered indispensable to our reports. It would be exceedingly becoming for Mr. Otto to take the lead in introducing them, especially as the decisions of the Supreme Court form so largely a system by themselves, and are in so great a degree independent of all others.

This volume is nearly as large as the previous ones issued by this reporter. But a more important respect in which the comparison is favorable is as to the character of the matter presented. A wealth of cases of value is here presented, similar to that which distinguished Mr. Otto's earlier volumes, indicating continued care in the selection. We have marked, for special mention, more cases than our space will allow us to refer to in detail. But some of those here reported are of exceptional importance.

Barkley v. Levee Commissioners, p. 258, is the somewhat celebrated case of the abolition of a "levee district" in Louisiana, from which it was held to result that the corporation became extinct, so that its creditors were without remedy by *mandamus* to compel the levy of taxes for the payment of their debts, and had no other resource than to apply to the legislature for a further remedy. This case has been frequently cited, of late, by repudiators,

behalf of embarrassed municipal corporations, as furnishing a precedent for the repeal or abolition of city charters, in order to escape the reach of the municipal bond-holder. But the case falls far short of reaching any such conclusion, and is easily seen to be distinguished by the important facts that two new levee districts had been created in lieu of the old one; that there were no officers of the latter remaining, and that there was no legal manner in which such officers could be supplied. No reference is made to any remedy in equity, it being well understood that proceedings in *mandamus* are *strictissimi juris*. But the next succeeding case in this volume is *Broughton v. Pensacola*, p. 266, in which a holder of bonds of a city corporation, which refused to pay its interest coupons, sought relief in equity, desiring to compel a levy of taxes; and in which the difficulty was that the charter of the city had been surrendered to the state, and an entirely new corporate organization had been formed over the same territory. This difficulty was held of slight import. It was said of a private corporation that, "in the view of equity, its property constitutes a trust fund pledged to the payments of the debts of creditors and stockholders;" and, further, that "if a municipal corporation, upon the surrender, or extinction in other ways, of its charter, is possessed of any property, a court of equity will equally take possession of it for the benefit of the creditors of the corporation." But it was held unnecessary to invoke equity in the *Pensacola* case, because there was still an identity of the city corporation, though different powers were granted, and different officers appointed to administer its affairs; and the remedies at law were held ample. So the bill was dismissed, without prejudice to the plaintiff's right to proceed at law.

Cowdrey v. Railroad Co., p. 352, holds that a receiver of a railroad corporation, appointed by a court, has no authority, without instructions from the court, to spend money in attempting to defeat the construction of a rival railroad, though intending, by so doing, to preserve the income of the railway in his charge. In the cases of the *Railroads against the United States*, p. 442, the act of Congress providing that a railroad to be constructed should be, and remain, "a public highway for the use of the government of the United States, free from all toll or other charge, for the transportation of any property or troops of the United States," was held, by a bare majority of the court, to secure to the government the free use of the road only, by its own rolling-stock, but not to

compel the gratuitous surrender to the government of the use of the rolling-stock of the company; the term "highway" thus being given its common-law meaning.

Hervey v. Locomotive Works, p. 664, reaffirms the doctrine of *Green v. Van Buskirk*, 5 Wall. 307, 7 ib. 139, that, where personal property is to be sold under legal process, its *status* is to be determined according to the law of the place where it is situated rather than that of the jurisdiction where its owner resides.

The rule in *Nudd v. Burrows*, 91 U. S. 441, that the practice act of 1872 was not intended to fetter the circuit judge in the discharge of his duties, or to trench upon his common-law discretion as to the manner of charging juries, is reaffirmed in *Railroad Co. v. Horst*, p. 291.

White v. Luning, p. 514, applies to a sheriff's deed the same rules, as to a sufficient description of the property conveyed, as apply to ordinary deeds *inter partes*.

In the two cases of *Clafin v. Houseman*, p. 130, and *Norton v. Switzer*, p. 355, the jurisdiction of the state courts to entertain suits by and against assignees in bankruptcy is maintained upon several grounds, the principle of *Eyster v. Gaff*, 91 U. S. 521, being reaffirmed.

Upon the question of necessary parties in chancery, the cases of *O'Hara v. MacConnell*, p. 150, and *Kerrison v. Stewart*, p. 155, will be found of interest, as to when trustees, under active trusts, are necessary parties, and when the beneficiaries under such trusts are not necessary parties.

In the two cases of *Home Insurance Co. v. Augusta*, p. 116, and *Morgan v. Louisiana*, p. 217, the important principle is enforced, in accord with *Providence Bank v. Billings*, 4 Pet. 561, that the abandonment, by the legislature, of the taxing power, in favor of a corporation, will not be presumed in the absence of an expressly statutory stipulation to that effect; while in *Railway Co. v. Trempeleau County*, p. 595, the court goes further, and holds, in accordance with *Tucker v. Ferguson*, 22 Wall. 527, that such a statutory contract of charter exemption must be clearly shown to exist, all presumptions being in favor of the retention of the taxing power; that the exemption "is in derogation of public right, and narrows a trust created for the good of all;" so that an exemption, not expressed to be permanent or irrevocable, is within the full control of the legislature, and may be withdrawn at any time.

The important case of *New York Life Insurance Co. v. Statham*

nds a place here, at p. 24, in which the Supreme Court settled for itself the question of the effect of the late war upon a life insurance contract, in an opinion which seems to have given very little general satisfaction to any class of litigants, underwriters, or law writers.

Several cases involve the question of the jurisdiction of the court, under both the limitation of \$2,000, formerly obtaining, and that of \$5,000, established by the act of 1875. But our space does not allow further citations from this interesting volume. Nearly all the opinions reported are commendably short, and admirably terse and condensed. The judges of the Supreme Bench seem to be, with a common intent, disposed to economize the time of their readers, as well as their own, and to abstain from all unnecessary amplification in their decisions, with the exception of Mr. Justice Clifford, upon whom the habit of long opinions seems to grow.

P.

A TREATISE ON THE LAW OF DAMAGES. By GEORGE W. FIELD, author of "A Treatise on the Powers, Duties, and Liabilities of County and Township Officers." Des Moines, Ia.: Mills & Co. 1876.

"The field of our jurisprudence," says the author of this work in his preface, "has been, within a few years past, greatly extended by the growth of several important commercial interests and the creation of many statutory rights. Thus has arisen most of the law relating to telegraphs; to damages, based upon statutes, resulting from death; from omission to fence; from the negligent setting of fires; and from the sale of intoxicating liquors. These topics have generally received some consideration by me, and an effort has been made to furnish all the important recent authorities bearing on them." Notwithstanding the extent and exhaustiveness of the treatises of Mr. Mayne and Mr. Sedgwick, the fact that these subjects above referred to, and some others—such as damages under the eminent domain acts and under the statutes in regard to setting out fires, and giving double or treble damages in certain cases—are of more recent origin, the law in these respects having grown considerably, if not entirely, very recently, may well excuse the publication of another text-book upon this branch of the law.

But an examination of this work reveals the fact that these subjects fill relatively a much larger space in the preface than in the body of the book. Three of them are despatched in as many pages, and the others are accorded but little more favor.

Without going over all, it will be sufficient to show the author's treatment of two subjects as examples. The statutes requiring roads to fence are discussed in a single page, and but a half-dozen adjudications are cited. The statutes giving a right of action for damages caused by the sale of intoxicating liquors, which have been adopted in eleven states, are given but two pages, and on seven cases are referred to. Considering that these statutes have been in force in some states for over twenty years, it might not unnaturally be expected that some questions would have arisen under them, and some interesting decisions have been reached. The truth is that there have, but the enquirer may look to this book for light in vain. We do not attempt a criticism of the rest of the work, as we are quite satisfied with the previous treatises, with which we are in some measure familiar. In justice to the author, it should, however, be said that his venture seems to have met with considerable favor, the present edition being nearly exhausted. We only regret that, to the subjects we have named, he had not devoted more time and research.

The appearance of a law book, in this day of many books, cannot always be hailed with delight by a profession, no member of which can ever hope to read a quarter of those already published, and many of which are not acquainted with even their titles. To say this, reflects no discredit upon the profession; for, after all, the best-informed lawyer will always be he who is familiar with a few standard works, rather than he who has a cursory knowledge of a library. We may be wrong, yet we cannot help thinking that what the busy practitioner, at the present day, stands most in need of in his profession is, not an accumulation of treatises on the same subjects, handled with little variety, but the means of expeditiously obtaining the decisions of the courts, as contained in the reports, and, on questions not yet settled, the latest adjudications in advance of the reports. The first need is satisfied, on some branches, by the digests; the second, by the law journals.

When a friend of Samuel Johnson remarked to him that barristers were less abusive than in former times, and suggested that they had less law formerly, and, therefore, were obliged to take to abuse to fill up the time, "Nay, sir," answered the oracle, "they had more law long ago than they have now. As to precedents, to be sure, they will increase in course of time, but the more precedents there are the less occasion is there for law; that is to say, the less occasion is there for investigating principles." Instead of

ending out the same old principles, stated in different language and arranged in different order, the book-maker might find it more profitable to gather the precedents in a form suitable for ready reference. Unless this is done, and the reports and text-books continue to be issued at the present rate for another half century, it is certainly not an exaggeration to say, as has been said of the accumulation of modern poetry, that there will have to be some new system of short-hand reading invented, or all reading will be given up in despair.

We have also received the second issue of this work. The call for a second issue so soon after publication shows that the book has had a large sale. The mechanical execution of this is in every respect a model. L.

TEN THOUSAND A YEAR. By SAMUEL WARREN, D.C.L., F.R.S.
A New Edition. Three volumes. New York: Cockcroft & Co. 1876.

This edition of *Ten Thousand a Year* leaves little to be desired. Clear type, clean white paper, good binding, and a text unmutated by the "editor," are recommendations enough for a new edition of so famous a book. An extended review of a work so well known seems out of place. We suppose that the number of readers of this *REVIEW* who are unacquainted with it is very small. For those who have not read it a rich treat is in store. The plot is carefully worked out, and the story intensely interesting from the beginning. It hinges on the result of a great ejectment suit. Following the story to its conclusion, we find one clearly indicated rule for the guidance of litigants—that is, never to give up a lawsuit until you are beaten beyond a doubt. One of the charms of the work is the naturalness of the characters and the situations. They are drawn to the life; and it is because they are real persons (in the sense that they are true to nature) that many of the characters have become typical of a class. Mr. Gammon, Mr. Parkinson, Mr. Runnington, Mr. Subtle, Mr. Attorney General, Mr. Weasel, Mr. Lynx, and others, are examples of types of lawyers; and, for a legal firm of a certain class, it would be hard to find an equal to Messrs. Quirk, Gammon, and Snap.

We had marked many passages in the book for quotation, but are compelled to confine ourselves to the following, which is such a capital description of a class of English lawyers that we quote it entire. Speaking of Mr. Weasel, the author says :

"He was a bachelor, upwards of forty; of spare make, of low stature, with a thin, sharp, sallow face, and short, stiff black hair; there was an appearance about the eyes as if they were half blind from being incessantly directed to white paper. He had a furrowed forehead, a small pursed-up mouth—one hardly knew why, but really there was something about his look that instantly suggested to you the image of the creature whose name he bore. He was a ravenous lawyer, darting at the point and pith of every case he was concerned in, and sticking to it—just as would his bloodthirsty namesake at the neck of a rabbit. In law he lived, moved, and had his being. In his dreams he was everlastingly spinning out pleadings which he never could understand, and hunting for cases which he could not discover. In the day-time, however, he was more successful. In fact, everything he saw, heard, or read of wherever he was, whatever he was doing, suggested to him questions of law that might arise out of it. At his sister's wedding, whither he had not gone without reluctance, he got into a wrangle with the bridegroom on a question started by Weasel himself, whether an *infant* was liable for goods supplied to his wife before marriage. At his grandmother's funeral he got into an intricate discussion with a puzzled proctor about *bona notabilia*, with reference to a pair of horn spectacles which the venerable deceased had left behind her in Scotland, and a poodle in the Isle of Man; and at church the reading of the parable of the *Unjust Steward* set his devout, ingenious, and fertile mind at work, for the remainder of the service, as to the modes of stating the case, nowadays, against the offender, and whether it would be more advisable to proceed civilly or criminally; and if the former, at law or in equity."

BISHOP'S CRIMINAL LAW. Sixth Edition. Two volumes. Boston: Little, Brown, and Company. 1877.

The sixth edition of this invaluable work on criminal law has just been issued from the press. The treatises of Mr. Bishop are so well known, and he has so long, by common consent, been accorded a position in the front rank of the thinking philosophical, legal writers of the age, that it would now be a work of supererogation to dwell upon his merits or give anything like an extended review of his books. He always has an opinion, and, what is still better, he gives his reason for it. It has been his peculiar felicity to have his opinions adopted by the highest courts in the land in cases where the law was previously doubtful or uncertain.

An examination of this, the sixth edition, furnishes abundant evidence that it is greatly superior in matter to any of the previous editions. The fifth edition was issued in 1872, and has been for some time out of print. This shows the great demand that exists for the work, and it also shows that books of sterling merit, written by good authors, command at all times a ready sale. A new edition by Mr. Bishop does not simply mean the addition or citation of the latest cases decided since the publication of the former edition, but it means a thorough revision of the whole subject, a pruning down of what is not considered valuable, and a substitution of new matter which may be found important to the profession. The truth of this proposition is apparent in looking over the edition now before us. The statement of legal doctrines, the order of arrangement, and the numbering of the sections is substantially the same as in the fifth edition. But in many respects it is a new treatise. A great deal of the text is rewritten, and the notes are greatly augmented. As an evidence of the author's labor and unwearied research, it may be stated that 2,498 new cases have been cited and added to this edition, being an increase of more than one-third of all the cases cited.

The whole work is characterized by an affluence of learning, an abundance of material, great scientific research, and strong practical sense.

The criminal lawyer who possesses Mr. Bishop's books is always "armed and equipped" for any emergency.

D. W.

BROWN'S LAW DICTIONARY. By ARCHIBALD BROWN, of the Middle Temple, etc. American Edition by A. P. SPRAGUE, Esq. Albany: Jno. D. Parsons, Jr., Publisher. 1876.

The title of this book sufficiently indicates its nature. Its real character, however, is best discovered by practical application of it to uses for which it was designed. In the small volume is found a concise, simple, and very accurate explanation of the *terms* and *aphorisms* of the law usually met with in treatises and reports. It does not purport to contain all subjects included in Burrill, Bouvier, Comlinson, etc., nor is this necessary for practical purposes. The American edition has adapted it to the requirements of the American lawyer, omitting from the English edition matter not important or valuable to him, and adding much that is essential. Authority is given for most of the definitions, and constitutes a valuable feat-

ure of the book. Critical examination and comparison of the definitions evinces the careful thought and conscientious application to the task assumed. This edition also contains legal maxims and their translations, and abbreviations usual in reference to law books. These are important additions. No argument is needed to convince any one that a table of abbreviated references is indispensable to the student and the lawyer, and we can conceive of no other plan so appropriate for it. This table has been revised, and is now adapted to the present state of law literature. The maxims and their translations are also very properly inserted in this volume.

The student is always much embarrassed and confused in understanding the meaning and application of maxims. There are books for his use, but they are not always at his command, and his studies are interrupted and retarded when he is compelled to have numerous books of reference at his elbow. There can be little doubt that the form in which our standard law dictionaries are published has much to do with the almost universal neglect of them by the student. Cost is also an important item to him. The field, therefore, which this little volume seeks to occupy has no rival claimant. Few law books offered to the profession are subject to so little adverse criticism as this; truth is, it is difficult to find fault with it.

It should be in the hands of every student of the law. It is happily adapted to his needs, and will be an invaluable aid to him. We question, also, if the practising lawyer will find the information he requires of this character elsewhere in form so convenient and reliable.

S. M. G.

A SUMMARY OF EQUITY PLEADING. By C. C. LANGDELL, Dane Professor of Law in Harvard University. Cambridge: Charles W. Sever. 1877. 130 pages, including Table of Cases Cited, and Index.

This *brochure*, its author states in the preface, was "designed primarily to form a supplement to a collection of Cases in Equity Pleading which has been used as a text-book in the law school of Harvard University during the last three or four years. As some persons, however, may want the Summary who will not care for the cases, and as there is no necessary connection between the two, it has been thought advisable to issue the former separately."

In a note upon the thirty-third page "the reader is requested to bear in mind that it is the object of these sheets to aid the student in acquiring a knowledge of the equity system, *as such*; and with

hat view the writer confines himself to the system as it existed in England from the earliest times to the end of Lord Eldon's chancellorship. Any attempt to notice the modifications of this system which have been made from time to time in the different states and jurisdictions of this country, or in England since the date last named, would interfere with the main design without any compensating advantage."

Why the study of equity pleading at Harvard University in 1877 should be limited to the system as it existed prior to 1827 is not explained. There may be satisfactory reasons for such limitation, or we may be in error in inferring from the foregoing quotations that such limitation exists. Whatever may be the reasons or the fact, it is to be regretted that Prof. Langdell, even at the risk of interfering with his "main design," should not have stated, in his chapters on "the Bill," "The Answer," "Demurrers and Pleas," the principal changes of the last half century in equity pleading. Their brief characterization in the professor's clear and elegant style would have completed what otherwise seems incomplete.

He leaves us no ground for criticising his explanation of the origin of the system. The introduction, divided into sections upon "Pleading in the Ecclesiastical Courts" and the "Origin and Nature of Equity Jurisdiction and Procedure," presents, in twenty-eight pages, the clearest and most comprehensive historical sketch of equity jurisdiction and procedure, and their relation to the common-law system of England, we have ever met with. Probably few American lawyers, judges, or professors have so profoundly studied the beginnings of equity practice as not to find something new to them in these introductory sections. A.

A TREATISE ON THE LAW AND PRACTICE AS TO RECEIVERS APPOINTED BY THE COURT OF CHANCERY. By WILLIAM WILLIAMSON KERR, of Lincoln's Inn, Barrister at Law. With Notes and References to American Authorities by GEO. TUCKER BISPHAM. Second American edition. Philadelphia: Kay & Brother. 1877.

According to Keats—

"A thing of beauty is a joy forever."

And so it is with a really good law book. It never becomes out of date. Age, instead of impairing its usefulness, merely mellows it, and gives it solidity and dignity. The case law in it—and there is, necessarily, more or less case law even in the best law book—may have become obsolete; remedies and rights therein discussed may

have been modified or abolished ; yet still the principles which contains will remain untarnished by the corroding breath of time ready to be applied to existing conditions. There are those who think, or seem to think, that the law is a rapid, thrifty grower, and that, to keep pace with its vigorous strides, a law treatise ought to be renovated and reshaken up as often as possible. But this is mistake. The law, as a science, is of very slow growth. The supposed changes are more apparent than real. Take, for example the change made in the common-law mode of procedure by the various codes. At first flash the departure seems to be radical and far-reaching, but on closer examination it will be found that it sticks mostly in the book. Chitty is still the best, safest, and most useful work on Pleadings. Any or all the code treatises might be burned up and the profession would hardly miss them ; the loss of Chitty would be irreparable. And so it is with other heads of the law. The essential elements are old and stable. While it will not do to rate Kerr on Receivers with the great law books, yet we regard it as one of the best modern monographs. The author's style is clear, simple, and direct. It is absolutely free from any show of mere learning. One whose taste has been perverted by reading the it-has-been-held-thus-and-it-has-been-held-so treatises which are now being ground out with painful rapidity by improved steam presses, might read this book carefully, and still feel that he did not know all about the law of receivers. And yet he would be surprised if he were to search the book for special questions of practical importance under the head of which it treats, to find how few have escaped notice. We refer, of course, to the text, and not to the American notes, which are meagre and incomplete. The more important recent cases are, as a rule, passed without notice. Fortunately the value of the work does not depend upon the American notes. The publishers have done their work well. The letterpress is clear and neat ; the paper and binding are excellent.

M. A. L.

THE PRACTICE IN THE UNITED STATES COURTS. By BENJAMIN VAUGHN ABBOTT. Vol. I. Third Edition. Rewritten and Corrected Conformably to the Revised Statutes and the Recent Decisions. New York : Ward & Peloubet. 1877.

This work is so well and favorably known to the profession that it stands in need of no special commendation from us. If the publishers had seen fit to send for review the completed work, in two

olumes, we should have been pleased to notice, for the benefit of our readers, the changes and improvements, if any there are, from the last edition ; but we cannot undertake to give a fair estimate of an uncompleted legal treatise any more than a tailor can undertake to cut a coat with half a pair of shears. The issuance of a two or three-volume text-book, one volume at a time, is not a practice that should meet with encouragement. While publishers always undertake to furnish the remaining volumes, at any time after their issuance, to those who purchase the first volume, yet, as a matter of fact, they usually take it for granted that all who wish them have bought them after the lapse of about three months. Thus many are left with an incomplete work, which can only be completed by purchasing it entire. We simply state what we have seen many times, and we warn our readers that it is the part of wisdom to refrain from purchasing *text-books* until they are completed.

INDEX F. Index to Decisions given by the Supreme Court of the State of Rhode Island, during the time occupied by its October Term, for the County of Providence, A. D. 1876. Justices of the Court: Hon. Thomas Durfee, Chief Justice ; Hons. Walter S. Burges, Elisha R. Potter, Charles Matteson, and John H. Stiness, Associate Justices. Cambridge : Printed at the Riverside Press. 1877. 155 pages.

This is a publication, under a recent law of the state of Rhode Island, affording to the profession the decisions of its supreme court prior to their appearance in permanent form. It contains, without head-notes, all cases decided from September 29, 1876, to March 10, 1877, and concludes with a full index of subjects.

This number of the "Index" is especially valuable for the reports of two cases, determined March 3, 1877, upon the much vexed questions whether a mortgage of personal property to be subsequently acquired conveys title to such property when acquired. The cases are *Williams, Administrator, v. Briggs*, p. 75, and *Cook v. Corthell*, p. 80. The opinion of Durfee, C. J., in the case first named, and the dissenting opinion of Potter, J., in *Cook v. Corthell*, cite and discuss nearly all the cases upon this question. Add to these cases the opinion of Lowell, J., in *Brett v. Carter*, 3 C. L. J. 286, and Mr. F. Hilliard's review of the latter opinion, 3 C. L. J. 359, and Mr. James O. Pierce's comprehensive article entitled "An American Phase of *Twyne's Case*," 2 SOUTHERN LAW REVIEW (N. S.), 731, and we probably have in them the

entire list of adjudications in England and America upon the question.

It is to be noticed that Judge Potter (in *Cook v. Corthell*, p. 9) cites and relies upon *In re Blenkhorn*, 22 W. R. 907, evidently overlooking the fact that "*In re Blenkhorn*" depended upon a peculiar provision of the English Bankrupt Act, with reference to "reputed ownership" or "apparent possession." (See 32 and 33 Vict. ch. 71, § 15, par. 5, Robson's Law and Practice in Bankruptcy, 3d ed. 494.) This distinction between the English and American law is repeatedly noticed by Judge Lowell in *Brett v. Carter*. A.

UTAH REPORTS. Vol. I. Being Reports of Cases Determined in the Supreme Court of the Territory of Utah, from the Organization of the Territory [in 1850] up to, and including, the June Term, 1876. By ALBERT HOGAN, Reporter. San Francisco: A. L. Bancroft & Co. 1877.

This volume contains eighty-five cases. Of these, twelve were decided prior to, and seventy-three since, the October term, 1873. Questions relating to the "peculiar institution" of Utah do not appear as frequently as might reasonably be expected. We find but one case indexed under the head of polygamy. The cases reported embrace a great variety of topics. The volume contains a list of attorneys now admitted to practice before the supreme court of Utah, which reminds us of the first volume of the reports of many of the Western and Southern states. It contains, also, a list of the governors, chief justices, and associate justices of the territory since its organization. The book is fairly printed and bound.

REPORTS OF CASES DETERMINED IN THE SUPREME COURT OF THE STATE OF NEVADA DURING THE YEAR 1876. Reported by CHAS. F. BICKNELL, Clerk of Supreme Court, and Hon. THOMAS P. HAWLEY, Chief Justice. Vol. XI. San Francisco: A. L. Bancroft & Co. 1877.

We have only space to notice the very creditable manner in which this volume of Nevada Reports is presented to the profession by Messrs. Bancroft & Co. To say that it surpasses, in style of printing, in quality of paper and binding, the later volumes of the Missouri Reports, would be faint praise indeed; for the last-named reports are, in the particulars mentioned, a disgrace to the state. Why the eleventh volume of the reports of the new state of Nevada

an be published decently, while the sixty-third volume of the Missouri Reports reflects no credit upon paper-maker, printer, or binder, a question for the legislature of this state to answer.

HUBBELL'S LEGAL DIRECTORY. For Lawyers and Business Men. Containing the names of one or more of the Leading and most Reliable Attorneys in nearly Three Thousand Cities and Towns in the United States and Canada; a Synopsis of the Collection Laws of each State and Canada, with instructions for taking Depositions, the Execution and Acknowledgment of Deeds, Wills, etc.; and a concise synopsis of the Bankrupt Law, with Registers in Bankruptcy. Also, terms for holding courts throughout the United States and Territories for the year commencing December 1, 1876. To which is added a list of prominent Banks and Bankers throughout the United States. J. H. HUBBELL, Editor and Compiler. New York: J. H. Hubbell & Co. 1877.

Scarcely anything, it would seem, need be added to such a very comprehensive title page, and the fact that the book is now so well known, this being the seventh annual volume, leaves little to be said in the way of review.

The editor certainly has taken great pains to acquire and compile the mass of useful information contained in its pages, and if he has fallen short at all, it is in the accuracy of the information given. This can hardly be judged of in a cursory examination of the work, and the detection of errors would only prove the necessity and usefulness of the book, since each succeeding volume has been steadily improved by the discovery and correction of inaccuracies, until it would seem that it is as near perfect as time, labor, and conscientious care can make it.

The names of those who have aided in perfecting the work are sufficient guaranty that it may be relied on, so far as the synopses of state laws are concerned.

C.

VIII. NOTES.

WE cannot refrain from again expressing the hope that the vacant seat of the Supreme Bench may be filled by a Southern appointee. It is a simple act of justice to the South, which would be universally approved, outside of some political circles. The reasons of our preference for Chancellor Cooper have been somewhat fully given, and we forbear to press them further now.

REMOVAL OF CAUSES.—The great importance of this subject must be an excuse for the article in this number, which is the third we have published on the subject. The writer, beside an able discussion of the duties of the state courts, over which the controversy rages fiercely, has elucidated the meaning of the words "suit" and "controversy," employed in the removal acts, more fully than we have seen elsewhere. The importance of the subject, the number of suits pending involving questions of removal, is attested by the very large sale the numbers of the REVIEW containing these articles have had; and especially the sale of the article by Judge Dillon, which was republished in pamphlet form, the second edition of which is being rapidly exhausted. It is the aim of the REVIEW to have the short treatises it contains on *live* topics, and this certainly seems to be a lively one.

"PRAISE FROM SIR HUBERT!" The *Irish Law Times* of May 26th says: "One of the most practically useful of our transatlantic exchanges is the *Central Law Journal*, published and conducted by Seymour D. Thompson (St. Louis, Mo.). It was founded and formerly edited by Hon. John F. Dillon; but that able jurist, who still maintains his connection with the editorial staff, cannot but acknowledge that within the present year the *Journal* has undergone such a remarkable change for the better that it is difficult to recognize it as the same serial. Both in form, matter, and management it now exhibits every excellence that should entitle it to attain a world-wide circulation, and we have no hesitation in saying that it reflects the highest credit on the spirit and enterprise of legal journalism in America." The same journal has also taken occasion to refer in flattering terms to this REVIEW. We note this to show that there is a growing disposition among our foreign exchanges to estimate the value of periodicals by their contents—not by their place of publication. Concerning this we expect to have something to say on a future occasion. The ability and candor with which the *Irish Law Times* is edited make it one of the most valued of our exchanges.

MISSOURI REPORTS AGAIN.—Since our last issue the legislature of Missouri has passed, with some slight amendments, the act providing for the

lication of the Missouri Reports, which we then urged it to pass. It is of the wise things the legislature did, and for it the profession in this state feel inclined to overlook some of its short-comings. Although, as we understand, the act is being anxiously scrutinized for defects in the manner of passage, we trust it will stand the "test of scrutiny, of talents (!), and of etc." If it does (and we believe it will), the profession in this state may be assured that the Reports will conform to the Fortieth Iowa Reports in mechanical execution, for the reason that there are parties in St. Louis whose libinations and pecuniary interest demand it. We have been long enough disgraced by the wretched mechanical execution of the Missouri Reports, and the parties to whom the contract shall be awarded are disposed to evade the letter of the law, and to force upon the state and the profession inferior works, because, forsooth, "the state pays," and "what is everybody's business is nobody's business," they will find that in this particular instance it is nobody's business; and that from no sentimental reasons—though sentimental reasons there are—but from reasons that appeal to the "pocket." We do this much in the hope that "an ounce of prevention" may be "worth a pound of cure" in the present instance.

We beg to apologize to our readers outside of Missouri for so often straying to the subject, but this matter is a "damned spot" on the fair fame of the publishing interests of St. Louis that will not "out" at a gentle bidding. We hope that no one will be compelled to resort to soap and sand, or a more caustic remedy, to erase it.

BLUE LAWS OF CONNECTICUT.—Whoever feels anger in his heart against England finds always ready to his hand two crushing charges against her. Besides the smallness of her territory: these are that witches were burned in Salem, and that the Blue Laws of Connecticut forbade a man to kiss his wife on Sunday. The first of these allegations may be left to Dr. Palfrey, Mr. Upham, and Mr. Poole; to the second it may be hoped that Mr. Trumbull has now given the *coup de grâce*. The volume edited by him [The Blue Laws of Connecticut, etc. Hartford: American Publishing Company, 1875] contains the early codes of Connecticut and New Haven, together with miscellaneous laws, orders, and judgments of both colonies, the whole occupying 350 pages. The first of these is the Connecticut constitution of 1638-9, which has been called "the first properly American constitution," the instrument by which the three towns of Hartford, Windsor, and Wethersfield—such were, if we are not mistaken, original independent political bodies—were united in a permanent union. The first fifty pages contain an introduction in two general parts: first, a statement of the popular beliefs, legislation, and judicial proceedings, especially of England, out of which this blue legislation grew; second, a history of the several blue-law falsifications, especially that of Mr. Peters, a native of Connecticut, who published in 1781 a mendacious and abusive history of Connecticut, from which are derived most of the absurd fabrications which pass as the Blue Laws of Connecticut. These forgeries of Peters occupy only eight pages, and are, on the whole, less gross than we had supposed. For Mr. Trumbull's controversial purposes—to

show the parallelism of Connecticut legislation with that of other communities—we have, in notes and at the end of the volume, copious extracts from laws and judgments of New York, Virginia, Massachusetts, and England—many of them quite as offensively Puritan—even those of Virginia—as the genuine laws of Connecticut. For instance, the 16th of Peters' laws read: "No priest shall abide in the Dominion; he shall be banished, and suffer death on his return. Priests may be seized by any one without a warrant. A foot-note (p. 303) says: "There was nothing like this in the code. New York had such a law, and *Virginia* forbade any popish priest to remain in the province more than five days after notice, and subjected every popish 'recusant' to a heavy fine on conviction." Again, we find in *Virginia* (p. 321), for blasphemy or unlawful oaths, on the second offence, "to have bodkin thrust through his tongue;" for the third offence, death. And in 1623-4 (p. 324): "Whoever shall absent himself from divine service on Sunday, without an allowable excuse, shall forfeit a pound of tobacco, and he that absenteth himself a month shall forfeit fifty pounds of tobacco. The fact is, the genuine Puritanical legislation of New England was the growth of the spirit of the age; it was here more consistent and thorough, and of longer continuance, than elsewhere, but, after all, not materially different in character.—*The Nation*.

FOR THE CONSIDERATION OF WHOM IT MAY CONCERN.—The appalling loss of life at the burning of the Brooklyn Theatre, and recently at the Southern Hotel fire in St. Louis, and the destruction of several places of amusement elsewhere, happily unattended with loss of life, has called public attention to an unusual degree to the condition of buildings devoted to public entertainment. Interest in the matter is, however, rapidly dying out, greatly to the relief, we doubt not, of many theatre managers; we do not look for a revival of it until some hundreds of persons are roasted or trampled to death in one of the many "man-traps," in various parts of the country, that are nightly crowded with people. In view of the certainty that the calamity will happen, it would be of interest to foresee when and where it will take place. As that positive knowledge is denied us, the best we can do is to approximate it on the doctrine of chances. Basing our conclusion on a somewhat extended acquaintance with theatres in various parts of the country, we are bound to say that, if we were to lay a wager on the locality of the next holocaust, we should take "St. Louis even against the field." We furthermore believe that unless some radical changes in the means of exit are made in at least two of our places of amusement—the Olympic Theatre and the Mercantile Library Hall—the loss of life will be three times as great as at the Brooklyn calamity, terrible as that was; and as the excellent class of the entertainments at these places draws thither the *élite* of the city, the loss of lives will be among them and not among those who patronize the variety shows. When the calamity shall have befallen us—which, unless measures are taken to prevent it, is almost certain to happen before 1890—measures will be taken to prevent further like calamities. The horse having been stolen, the stable door will be fastened. We are tempted to give reasons for fixing the year at 1890.

st, and to demonstrate syllogistically, on the doctrine of chances, that it happen before that time. But we have referred to the matter only to attention to the large number of laws for the regulation of public buildings which have recently been enacted, and to the probable attitude of the courts toward them, should their enforcement be resisted.

So far as we have observed, every state legislature that has been in session since December last has devoted attention to the subject, and many useful laws have been passed. It would be tedious, and without the present purpose, to speak of them in detail. The points to be noticed are that we have many laws for the regulation of public buildings; that they apply to public buildings that were in existence before the laws were passed, and that their enforcement will require extensive alterations in many of them. It is not probable that any manager will refuse to conform to reasonable regulations, required so to do by the proper official, because it would doubtless cause a loss of patronage to an amount many times the cost of the required improvement. But if resistance should be made in any case, it seems to us that the recent decision of the Supreme Court of the United States in the *Anger* cases leaves no room for courts to refuse to enforce any reasonable regulations: for if the courts sustain the validity of laws regulating public buildings (in elevators) where the *convenience* only of the public is concerned, *a fortiori* must they sustain laws which concern the public *safety*. The regulations for the elevators were enforced a long time after their erection and operation, just as the regulations for public buildings are to be enforced after their erection. We quote a single paragraph from the opinion of the court, delivered by Chief Justice Waite—it bears so directly on the point under consideration: "When one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and it submit to be controlled by the public, for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to control." The full opinion may be found in 4 C. L. J. 250.

We are glad to know that these calamities have borne some substantial fruit besides acts of the legislatures. Two theatres, at least, in Boston have been remodelled, at very large expense, at the request of the proper official, and all other public halls have been thoroughly inspected and pronounced safe. We presume other cities have been more or less benefited; but if any regulations have been made in the St. Louis theatres, we have not yet been able to discern them.

A nice question of law has been suggested by the course of many theatre managers since the Brooklyn tragedy—that is, how far have they rendered themselves *criminally liable* by their attempts to deceive the public? We take the case of the managers of the Olympic Theatre in this city as an example, not because they used greater efforts to deceive the public than others, but because we have watched their course with some interest, are ignorant of the facts whereof we wish to speak, and because a calamity by fire in that place would have more disastrous consequences there than at any other place we know. The building is notoriously unsafe. The terms usually employed

in its description are "man-trap" or "fire-trap." We have repeatedly heard strangers remark upon its manifest unsafety immediately on entering it for a performance. We know men in this city who have sworn that neither they nor their families shall enter it until changes have been made. It is an outrage to ask the public to enter it. It would be a pleasure to demonstrate, did space permit, that if one person in fifty of a crowded audience escaped in case of fire it would be a larger percentage than could reasonably be anticipated. The means of exit are entirely inadequate. Now, immediately after the Brooklyn disaster the management used every effort to induce the public to believe that new and ample means of exit were being made, and the building rendered entirely safe. Advertisements to that effect were circulated profusely and inserted in the daily papers. Every means seem to have been resorted to to advise the public of the enormous expense the managers were incurring, which are used to inform the public of any fact which it is for their (the managers') pecuniary advantage that the public should know. Now, if all, or any considerable portion, of the promised changes have been made there should be some visible evidence of it. With a view to ascertaining what has been done, we have examined the theatre with some care, both from without, and within so far as possible without going behind the scenes, and we are firmly convinced that not a dollar has been expended on the building to ensure the safety of its audiences in case of a fire.

To invoke the aid of the criminal law to prevent a person from doing that which, done with no malicious intent, the happening of a probable event will render him criminally liable for the doing, would indeed evoke some nice and unusual questions of law. We expected to have published in this number of the REVIEW an article on the criminal law, a part of which would have touched directly on the subject. The consideration of the topic is beset with difficulties, not the least of which is the fewness of the adjudged cases. This paucity of cases is scarcely to be wondered at, since they would hardly arise except through the action of some official, zealous to perform his whole duty regardless of consequences, or through the interference of some public-spirited individual, anxious to achieve a broken head or a depleted purse, and riden for his pains. Speaking generally, it would seem that if the law can interfere to prevent an intended theft, for instance, it can interfere to prevent willful negligence which the happening of a probable event will convert into crime inexpressibly wicked, involving the loss of the lives of hundreds of persons. And we believe the criminal law can be made to reach a person who, for pecuniary gain, with a knowledge of the danger to which persons are thereby exposed, makes false representations to the public, and imperils daily the lives of a thousand individuals.

We appreciate the fact that the business of amusing the public is one of very peculiar character, requiring for its successful prosecution very great audacity. We do not specially object to advertisements that are rather more extravagant than a strict adherence to facts would justify. We confess to feeling amusement, rather than anger, at being outrageously swindled by one out of ten elaborately advertised performances; but we do object most vigorously to being *also* deceived in respect to our personal safety; and we un-

at the half-formed purpose, which we know several gentlemen entertain, to : the courts for instructions as to the duties of theatre managers toward : public, will take shape before the fall season begins, unless the man- : ers of the Olympic Theatre shall take the present time, when the theatre is : sed, to *make* some of those changes for the safety of its patrons they so : ishly promised last winter.

IX. DIGEST IN BRIEF OF RECENT CASES

REPORTED IN FULL IN THE LAW JOURNALS SINCE LAST ISSUE

PREPARED BY S. OBERMEYER, ESQ., OF THE ST. LOUIS BAR.

[The object of this department of the REVIEW is to advise our subscribers of points decided in the latest reported cases, and to show where they can obtain at very small expense, full reports of cases in which they have an interest. To this end the points decided are briefly and pointedly given, with the abbreviation and date of the journal where the case is reported in full. The price of single numbers of each journal is also given, which, remitted to the address given, will secure a copy of any desired issue.]

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ACTION.—Given by statute for injuries resulting in death, not transitory.—*McCarthy v. Chicago, etc.*, R. W. Co., Sup. Ct. Kas., C. L. J., May 18, p. 465.

ADMIRALTY.—The law relating to common carriers has no application to duty of a tug in towing a vessel; Only reasonable care and skill required: Tug is bound to know channel about its home-port; Tug held liable for failure to exercise reasonable skill and care under the circumstances.—*Thompson v. Bliss*, U. S. Cir. Ct., E. D. Wis., C. L. N., Apr. 7, p. 233.

— Jurisdiction; Liability of consignee for damages in the nature of demurrage.—*Sheppard v. Philadelphia, etc., Co.*, U. S. Dis. Ct., E. D. Pa., W. N. C., Apr. 26, p. 565.

— Lien for towage sustained, although libellants had taken a note for their work, which was transferred to a bank, not paid at maturity, and taken up by libellants, and although vessel had, in the meantime, been conveyed by parties for whom towage was done to the claimant.—*Starke v. Schooner Napoleon, Bilo*, claimant, U. S. Dis. Ct., E. D. Wis., C. L. N., May 12, p. 280.

ADVERSE POSSESSION.—Agreement as to boundary line; Twenty years' possession.—*McNamara v. Seaton*, Sup. Ct. Ill., C. L. N., May 19, p. 296.

ARBITRATION.—Agreement for reference; Compromise agreement; Mutual performance; Accord and satisfaction.—*Weichert v. Hook*, Sup. Ct. Pa., W. N. C., Apr. 5, p. 488.

ARREST.—Of a party from Chicago in Canada; Affidavit to hold to bail; What sufficient for affidavit to state; Application for discharge from arrest refused.—*Rogers v. Cutting*, Queen's Bench (Ont., Can.), C. L. N., Apr. 21, p. 256.

ATTACHMENT.—Against fund in court; Effect of service on executors as garnishees; Order of orphans' court retaining fund until determination of attachment in common pleas; Interlocutory and not final; Errors and appeals; Practice. — Valentine's Appeal, Poulson's Estate, Sup. Ct. Pa., W. N. C., Mar. 29, p. 471.

— Statute as to what term of court attachment writs are returnable, construed. *Held*, that all writs, whether issued more or less than ten days before a certain term, against the same person and the same property, were properly so made returnable, and were to share proceeds of attachment *pro rata*. — Mechanics' Savings Institution v. Givens, Sup. Ct. Ill., C. L. N., Mar. 31, p. 226.

— The jurisdiction of a state court, in cases of attachment, is not ousted by proceedings in bankruptcy, unless properly pleaded in the state court. — Haber v. Klauberg, St. Louis Ct. App., C. L. J., Apr. 13, p. 342.

— Foreign; Service of writ; Bail for release of property attached; Not dissolved by entry of bail in error; Nor by subsequent seizure of property under an execution, if such execution is set aside by the court; Affidavit of defence law; Recognizance of bail for release of property in foreign attachment a sufficient instrument within the act. — Selser v. Dialogue, Sup. Ct. Pa., W. N. C., May 3, p. 10.

ATTORNEY AND CLIENT.—An attorney employed by a person to examine the title of premises, upon which a mortgage is to be made as security for a loan, is not necessarily the agent of the person employing him to receive money from the borrower to pay off prior liens and encumbrances; Constructive notice to the principal of liens discovered by his attorney, and its effect. — Josephthal v. Heyman (with note), Sup. Ct. N. Y., C. L. J., Apr. 20, p. 368.

BAILEMENT.—Negligence; Common Carriers; Liability of, for loss of passenger's baggage; Act Apr. 11, 1867 (Purd. Dig. 1228); *Lex loci contractus*; Foreign corporation; Contract for transportation of passenger's baggage to be performed in another state; By common law, passenger not required to state value of his baggage unless requested to do so. — Brown v. Camden, etc., R. R. Co., Sup. Ct. Pa., W. N. C., May 10, p. 21.

BANKING.—National Banks; Persons who hold stock of same in pledge are, as long as they hold stock in pledge, responsible to creditors of the bank in proportion to the amount so held; But a sale of the stock, under an authority conferred by the terms of the pledge, is not obnoxious to the charge of having been done in fraud of creditors, although its leading object may have been, on the part of pledgee, to avoid liability as a stockholder, under the twelfth section of National Banking Act. — Magruder v. Colston, Ct. App. Md., Alb. L. J., May 19, p. 389.

— The payee of a check, which has not been accepted by the bank on which it is drawn, cannot maintain an action upon it against the bank. Payment to a stranger, upon an unauthorized endorsement, does not operate as an acceptance of the check so as to authorize an action by the real owner to recover its amount as upon an accepted check. — First National Bank v. Whitman, Sup. Ct. U. S., Alb. L. J., May 19, p. 392.

BANKRUPTCY.—A composition under section 17 of the bankrupt act (R. S., sec. 5103 a) only exonerates the bankrupt, and does not discharge his coobligors or sureties. — Mason & Hamlin Organ Co. v. Bancroft (with note), Sup. Ct. N. Y., C. L. J., Mar. 30, p. 295.

— A bill of review, praying that a decree in bankruptcy be reviewed, is not a writ within sec. 2057 of Rev. Stat. U. S., and the limitation of two years, prescribed by the said section, does not apply to such proceeding. — Wilt v. Stickney, U. S. Dis. Ct., N. D. Ohio, Am. L. Rec., Apr., p. 630.

— Bankrupt Act has not suspended the right to make an assignment for benefit of creditors, provided it be without preferences, and made without

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- intent to defraud creditors; Under chap. 348, Laws 1860 (N. Y.), the omission of assignee to execute and file a bond does not, *per se*, invalidate the assignment.—*Von Hein v. Elkus*, Sup. Ct. N. Y., N. B. R., Apr. 2, p. 194.
- A broker who has advanced money for the differences on an option contract in wheat cannot prove his claim for the amount advanced against the estate of bankrupt.—*In the matter of Green*, U. S. Dis. Ct., W. D. Wis., N. B. R., Apr. 2, p. 198.
- If a bankrupt, under the laws of Texas, acquires a right to a rural homestead, the subsequent extension of the limits of a city, so as to embrace part thereof, does not affect his right.—*In re Young*, U. S. Dis. Ct., W. D. Tex., N. B. R., Apr. 2, p. 205.
- A bankrupt must apply for his discharge before the final disposition of the administration of the estate.—*In re Brightman et al.*, U. S. Cir. Ct., S. D. N. Y., N. B. R., Apr. 2, p. 218.
- The state has no priority over other creditors to funds which had been deposited by a warden of the state penitentiary in his name, as warden ("H. N. Smith, warden"), in a bank, the court holding that by statute he and the securities on his official bond were individually liable to the state for the amount, although the bank failed immediately after said deposit by him as warden, and although he kept two separate accounts at the bank, one being his private account, and the other his account as warden.—*In re The Corn Exchange Bank*, U. S. Cir. Ct., E. D. Wis., N. B. R., Apr. 2, p. 216 *s. c.*, C. L. N., Apr. 21, p. 254.
- When an assignment for benefit of creditors is set aside at suit of assignee judgment creditors who have levied upon the property after assignment and before commencement of proceedings in bankruptcy, have no priority over assignee, whose title in such case relates back to time of transfer.—*In re Biesenthal et al.*, U. S. Cir. Ct., N. D. N. Y., N. B. R., Apr. 2, p. 228.
- A creditor cannot compel partners to petition for the adjudication of the alleged copartners; Nor can any man lawfully be called upon to show cause why he shall not go himself, or put anybody else, into bankruptcy.—*In re Harbaugh et al.*, U. S. Dis. Ct., W. D. Pa., N. B. R., Apr. 2, p. 246.
- Fees of registers are governed by General Order No. 30, promulgated April 12, 1875, although the services were rendered before its adoption.—*In re Carstens*, U. S. Cir. Ct., S. D. N. Y., N. B. R., Apr. 2, p. 250.
- In involuntary proceedings against a separate partner, creditors of the partnership must be counted in computing the legal quorum of petitioning creditors; Requisite proportion of creditors who must be joined; Claim of creditor on a bond, the sureties on which have been indemnified by mortgage, is not a secured claim, and should be counted; Register in his report should return lists of claims counted and rejected.—*In re Lloyd*, U. S. Dis. Ct., W. D. Pa., N. B. R., Apr. 2, p. 257.
- Rights and duties of assignee, as agent of creditors, in the recovery of property belonging to estate, explained; In suit by creditors of one who had fraudulently assigned property to bankrupt, to recover the proceeds therefrom from the assignee, held that creditors of bankrupt had superior equities to same; But such suit is not barred by the two years' limitation prescribed in Bankrupt Act, where the grounds stated in avoidance of the bar apply to the assignee as concealing the alleged fraud; An assignee of demands existing at time of fraudulent transfer, is entitled to the same rights that his assignor would have had if no assignment had been made.—*Aiken v. Edrington*, U. S. Cir. Ct., S. D. Miss., N. B. R., Apr. 2, p. 271.
- A bankrupt may maintain an action, in his own name, upon a check or action assigned to him as part of his exempt property; A new promise to repay repels the bar of an adjudication need not be in writing.—*Henly v. Lasker*, Sup. Ct. N. C., N. B. R., Apr. 2, p. 280.

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— An order by a state court, in supplementary proceedings, founded on a judgment obtained after the petition in bankruptcy was filed, does not protect a third party from demand, by an assignee, for moneys belonging to the bankrupt estate. *Morris v. First National Bank*, Ct. App. N. Y., N. B. R., Apr. 2, p. 281.

— An objection that an assignment, by a bank, under the laws of Pennsylvania, is invalid against Bankrupt Act, can only be raised by creditors of the bank; It cannot be set up as a defence to a suit brought by the assignees. — *Shryock v. Bashore*, Sup. Ct. Pa., N. B. R., Apr. 2, p. 283.

— The crime defined in sub. 6, sec. 5132 of Rev. Stat. U. S., in the wilful and fraudulent omission by a debtor of property from his inventory, is not an infamous crime, within the meaning of that term at common law, and as used in the fifth amendment to the constitution, and, therefore, a party committing it may be prosecuted by information, in accordance with the common law procedure.—*United States v. Block*, U. S. Dis. Ct., D. Oreg., C. L. N., Apr. 7, p. 284; *s. c.*, N. B. R., Apr. 15, p. 325.

— The federal courts have exclusive jurisdiction in actions brought by assignee to recover value of goods fraudulently transferred by the bankrupt; State courts will follow decision of bankrupt court annulling a sale of goods, but state courts cannot of themselves annul a sale, valid under the laws of the state where it was made, because fraudulent under the bankrupt law.—*Bromley v. Goodrich*, Sup. Ct. Wis., N. B. R., Apr. 15, p. 289.

— A partnership is dissolved by one of the partners being adjudicated a bankrupt; In North Carolina the statute of limitations begins to run against a purchaser of a chose in action at the assignee's sale from the date of the adjudication, and this although the bankrupt himself is the purchaser.—*Blackwell v. Claywell*, Sup. Ct. N. C., N. B. R., Apr. 15, p. 300.

— Claim of sheriff for fees and expenses in attachment proceedings, begun within four months prior to proceedings in bankruptcy, will not, as a general rule, be allowed. But where it is conceded that the attachment conserved the property and benefited the general creditors, the court will allow such claim.—*In re Jenks*, U. S. Dis. Ct., D. Minn., N. B. R., Apr. 15, p. 301.

— Limitation within which a preference may be set aside; Where a party who voluntarily restores to assignee a preference received, and where there is no actual, but only a constructive fraud, will be allowed to share *pro rata* with the other creditors.—*In re Schœnenberger*, U. S. Dis. Ct., S. D. Ohio, N. B. R., Apr. 15, p. 305.

— Attachment issued within four months before commencement of proceedings in bankruptcy will, upon notice and motion, be dissolved by the state court, although a judgment has been entered, and the proceeds of a sale of the attached property paid over to the plaintiff by the sheriff, under an execution.—*Dickerson v. Spaulding*, Sup. Ct. N. Y., N. B. R., Apr. 15, p. 313.

— A discharge of a judgment debtor, before the affirmance of the judgment on appeal, does not release the sureties on the appeal bond.—*Knapp v. Anderson*, Sup. Ct. N. Y., N. B. R., Apr. 15, p. 316.

— A mortgage upon real estate, executed immediately before commencement of proceedings in bankruptcy, in pursuance of a parol agreement made long before that time, is not a preference, and is valid as against the assignee; Such agreement, executed by a mortgage to a guardian, inures to the benefit of the infant, and, until avoided by infant on coming of age, is valid as against the assignee.—*Burdick v. Jackson*, Sup. Ct. N. Y., N. B. R., Apr. 15, p. 318.

— Creditor omitting to show, when he makes proof of claim, that bankrupt has an unsatisfied claim against him, cannot, when sued by assignee, make use

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- of claim proved as a set-off; A state court has jurisdiction of an action brought by assignee to collect a claim due to the estate.—*Russell v. Owens*, Sup. Ct. Mo., N. B. R., Apr. 15, p. 322.
- Where a claim originated in contract, although fraudulently induced, prosecuted in an action sounding in damages, it continues to constitute a provable debt, even though the fraud must be proved to entitle the plaintiff to a recovery; Such an action is within sec. 5106 of Rev. Stat. U. S. and cannot be prosecuted to final judgment until the determination of the debtor's discharge.—*In re Schwarz*, U. S. Cir. Ct., S. D. N. Y., N. B. R., Apr. 15, p. 330.
- Statement of the rule as to liability of joint estate of partnership and separate estates of the partners; A bankrupt partner who has, during the existence of a bankrupt firm, advanced to latter, for firm purposes, money in excess of his copartner's share in the capital stock, has no claim against the separate estate of his debtor copartner until all the joint creditors are fully satisfied.—*In re McLean et al.*, U. S. Dis. Ct., D. Del., N. B. R., Apr. 15, p. 333.
- Procurement by debtor of entry of judgment, and execution thereon, in violation of Act of bankruptcy.—*In re A. Benton & Bro.*, U. S. Cir. Ct., E. D. Pa., W. N. C., Apr. 19, p. 547.
- When the giving a warrant of attorney will be considered fraudulent under the bankrupt law.—*In re August Herpich*, bankrupt, U. S. Cir. Ct., S. D. Ill., C. L. N., Apr. 21, p. 253.
- The bankrupt had, prior to his bankruptcy, made a loan, and had delivered to his creditor a bill of sale of some personal property, and received from him a writing in the nature of a lease, whereby the debtor was allowed to remain in possession of the property. Neither of the instruments were recorded. *Held*, that the whole transaction was fraudulent as to other creditors, and that the assignee had a right to the property in question.—*In re Thomas C. Gurney*, U. S. Cir. Ct., E. D. Wis., C. L. N., Apr. 21, p. 255.
- Court of, has not authority to order sale of property, as a bankrupt's, where it is in the possession of another person claiming title; Sec. 5063 of Bankrupt Act; Trespass against sheriff for seizing plaintiff's property on execution against another; Delivery of property to assignee of the other person, under order of bankruptcy court, no defence.—*Stanley v. Sutherland*, Sup. Ct. Ind., Am. L. Reg., May, p. 298.
- Practice; Federal Supreme Court cannot review the action of circuit courts in the exercise of their supervisory jurisdiction under the bankrupt law, as on questions arising on proof of claims, but may review all suits brought under Revised Statutes (sec. 4979), which are no part of bankruptcy proceedings.—*Wiswall v. Campbell*, Sup. Ct. U. S., C. L. N., May 5, p. 289.
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—Bonds issued in aid of building a steam custom mill held valid under a statute of Kansas authorizing their issue in aid of "works of internal improvement," and another statute declaring such mills "public mills."—*Township of Burlington v. Beasley*, Sup. Ct. U. S., C. L. N., Apr. 28, p. 263.

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— The liability of property to be sold, under legal process issuing from the courts of the state where it is situated, must be determined by the law there rather than that of the jurisdiction where the owner lives.—*Hervey v. Rhode Island Locomotive Works; Indianapolis, etc., Co. v. Same*, Sup. Ct. U. S. C. L. N., Mar. 31, p. 225.

— A marriage between a negro and white person, though legal in South Carolina, yet if it be there entered into between parties then domiciled in North Carolina, who contracted such relation in the former state to evade the laws of the latter, it will be held void in the courts of the latter.—*St. v. Kennedy*, Sup. Ct. N. C., C. L. J., Apr. 27, p. 391.

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— A statute of Louisiana forbade the survey of the hatches of sailing vessels coming to the port of New Orleans, and of damaged goods on board such vessels, by other persons than the master and wardens of the port of New Orleans. *Held*, that the statute was void, being within art. 1, sec. 8, of the federal constitution.—*Foster v. Master and Wardens, etc.*, Sup. Ct. U. S., Alb. L. J., Apr. 14, p. 295.

— Acts of state assembly taxing "all peddlers of sewing machines, and peddlers selling by sample," declared not repugnant to constitution of United States.—*Howe Machine Co. v. Cage*, Sup. Ct. Tenn., C. L. N., Apr. 21, p. 259.

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— Act of legislature in aid of establishment of normal schools *held* constitutional, though art. 9, secs. 2, 4, of Missouri constitution, providing for maintenance of free schools, mentions only free schools and a state university by name; And same act held also not to be within constitutional prohibition regarding special legislation.—*Briggs v. Johnson County*, U. S. Ct., W. D. Mo., C. L. J., May 4, p. 414.

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—Between plaintiff and defendants, who were proprietors of a mercantile agency, by which latter undertook to furnish former information respecting the mercantile standing of his customers. *Held*, that plaintiff could not recover for breach of contract by defendants in giving false information, because the same was not reduced to writing as required by the statute (Con. Stat., U. C., cap. 44, sec. 10).—McLean v. Dun et al., Ontario (Can.) Ct. App., C. L. J., May 4, p. 421.

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—A person may be criminally prosecuted for libel upon a business corporation without alleging that the latter has sustained any damage; At common law, and in Missouri, counts for distinct misdemeanors may be joined in the same information, and the defendant may be sentenced for more than one offence at the same time by assessing a separate penalty on each count; The punishment should not be lumped; Where trial judge dies after motion for new trial overruled, but before settling of bill of exceptions, the succeeding judge should award a new trial.—*State v. Boogher*, St. Louis Ct. App., C. L. J., Apr. 6, p. 321.

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— Effect of judgment as a bar to a second action upon the same and different claims between the same parties; *Held*, that a judgment for defendant in a former suit upon certain coupons, because plaintiff in that case was shown to be a holder for value before maturity, did not estop the present plaintiff from maintaining present suit upon bonds and coupons of the same series as coupons formerly sued on, and from showing that he had acquired the coupons now sued on for value and before maturity; *Also held*, that defendant was not estopped from showing that plaintiff in former action prosecuted the same, in fact, for the benefit of the plaintiff in the present suit.—*Cromwell v. County of Sac* (with note), Sup. Ct. U. S., C. L. J., May 4, p. 416.

— Where the jurisdiction of a court of special authority appears upon the record, its action and decision can no more be collaterally assailed than the judgments of courts having a general jurisdiction; This rule applied to claim made by a defendant in an action of ejectment to title acquired by sale under a license of county court, which license plaintiff claimed had not been obtained upon requisite notice of the time and place of hearing the application for the license.—*Mohr v. Maniere*, U. S. Cir. Ct., E. D. Wis., C. L. N., May 5, p. 270.

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— Since the Revised Statutes a bill in equity will not lie solely to recover damages for the infringement of a patent, but if it pass for an injunction, or for a discovery and account of profits, it will be maintained. Notwithstanding the repeal of the limitation clause in sec. 55 of the act of 1870, an action will lie upon a patent expiring before the adoption of the Revised Statutes, if brought within six years after the expiration of the patent. Such action is not affected by state statutes.—Vaughan v. East Tennessee, etc., R. R. Co., U. S. Cir. Ct. Tenn., C. L. N., Apr. 21, p. 255.

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I. *ON THE UNCONSTITUTIONALITY OF THE ACT OF CONGRESS OF FEBRUARY 12, 1873.*

When this country achieved its independence much was still wanting towards a government capable of securing unison and tranquillity at home and consideration abroad. The several states had an autonomy of their own, but differed among themselves as to the measures demanded by the general welfare, and presented to the eyes of foreign nations a loosely-connected league of thirteen small states, any of which, at pleasure, might withdraw from the association. Such a power could not expect to be greatly respected by a world accustomed to measure nations by their fleets and armies; and divided councils at home threatened those disturbances which can be composed only by referring inevitable disputes to a common arbiter. The respectable, but wholly unsatisfactory, scheme of government furnished by the articles of confederation proved still more unfitted for the trials of peace than for the ordeal of war, and all reflecting men saw that a necessity was laid on them of devising some plan of central authority which, while it secured the exhibition of energetic federal action, should guarantee the rights of the states, or of seeing the failure, in a large measure, of the great work accomplished by the heroes and patriots of the Revolution.

It was not enough to perceive the conditions of the problem. Its practical solution was full of difficulty. But at length

it was completed by the constitution proposed by the convention of 1787. The people ratified it, and for nearly ninety years the wisdom of its founders has been vindicated by the success of the government thus set up. This success has not been unvarying, nor has the approval of the work been unanimous. We have so often fallen below, not only our own ideal, but below the example of our fathers, that at times despondency has been a wide-spread feeling; but the great bulk of rational, candid, and thoughtful men stand in full agreement that the only good government possible for the United States is to be found in the perfecting of the scheme devised in 1788, and that with such marvellous wisdom and good fortune was that scheme devised that the best mode of perfecting it lies in reverting to the informing, animating principles of the original instrument. To the development of these, rather than to the introduction of new ideas, the efforts of statesmen will be most advantageously directed. From the beginning our prosperity and well-being have gone hand in hand with an adherence to those original principles, while every departure from them has been visited by a punishment more or less condign. This purity of the source of the stream of our government is an altogether inestimable advantage.

Of course the most delicate adjustments effected by the constitution were those which assigned to federal and state authority their respective spheres of action; and for the practical and harmonious working of both it was essential that neither should transcend its allotted sphere. Usurpation was hardly anticipated in that early day, but sedulous care was taken that encroachments should not occur through mistake; and for many years none were found to deny that the exercise by the general government of a power not granted by the constitution was of infinitely worse example and consequence than the endurance of any inconvenience resulting from the inability to exercise it. It was received by men of all parties as an obligation of political morality that, if the exercise of some power not given by the constitution should appear to be ever so beneficial, it was nevertheless sternly forbidden by all who recognized their duty to preserve

it constitution inviolate; and that the only course of action under such circumstances which was not criminal was to ask, in the manner prescribed by the constitution itself, for new power, and in the meantime to abstain religiously from the claim or exercise of any doubtful authority.

Among the powers given by the constitution to Congress is one "to coin money, regulate the value thereof and of foreign coin." This was one of the most important of the powers confided to the central government. The war of independence had wasted our resources, and, in the universal distress which was felt at its close, resort had been had by many of the states to those seductive and pernicious palliatives by which ignorant men so often attempt to furnish cheap money to the community, and to propitiate debtors by the enactment of "relief laws" and legal-tender acts. The disorder thus occasioned was not among the least of the evils which the constitutional convention was called on to remedy, and its provisions were steadily directed to its extirpation. That they were eminently successful is known to all. The government established, among its other titles to the favor of the people, was called a "hard-money government;" and after its establishment, and down to 1862, the only kind of money known to the constitution and the law was the gold or silver coin legalized by Congress.

In the year 1862, the United States being engaged in a civil war of unexampled proportions, the Congress of that day passed an act (February 25, 1862) for the issue of United States notes, declaring them lawful money and making them a legal tender for all debts, public and private, past and future, except that the importers of dutiable goods were declared bound to pay the duties in coin, and the *interest* on the bonds and notes of the United States was declared to be likewise payable in coin. Various other acts of the same nature were passed during the war, but this is the type of them all.

The debt created and remaining unpaid at the end of the war was enormous. At this time, though somewhat reduced, it exceeds \$2,500,000,000.

By an act of Congress passed March 18, 1869, the faith of the United States was "solemnly pledged to the payment of coin, or its equivalent, of all the obligations of the United States not bearing interest, known as United States notes, and of all the interest-bearing obligations of the United States, except in cases where the law authorizing the issue of any such obligations has expressly provided that the same may be paid in lawful money or other currency **than gold and silver.**"

By section 15 of the act of February 12, 1873, the weight of the silver dollar was raised from 412 1-2 to 420 grains, true weight, of standard silver. The weights of the half-dollar, quarter-dollar, etc., as fixed by the act of 1853, were scarcely changed. But the silver dollar was declared to be a legal tender only in sums of \$5 or less; and by section 14 the gold coins provided by that act were declared a legal tender in all cases and for all sums. I propose to demonstrate the following propositions:

1. That Congress has no power to declare what shall or what shall not be legal tender; that this power belongs to the states alone, and as to them is subject to the restrictions and limitations imposed by the constitution of the United States; that any act of Congress declaring that money, of gold or silver, coined by the United States shall be a legal tender at its face is superfluous and supererogatory; that any act of Congress declaring that such gold or silver coin shall not be a legal tender is repugnant and void; and that any act of Congress declaring anything but gold and silver coin to be legal tender is a usurpation and a nullity.

2. That the sole function of Congress, in respect of money, is to coin it and regulate the value of it and of foreign coin; but that the properties or characteristics of money exist independently of Congress. Congress is directed by the constitution to ascertain and recognize those properties and characteristics, but obtains no authority to change or disregard them.

3. That the constitution of the United States recognizes nothing as money but coin of gold or silver.

4. That, as a corollary from what precedes, all acts of Congress declaring anything but gold or silver coin to be 'lawful money' or a 'legal tender,' or declaring coined money of either of these metals not to be 'lawful money' or 'legal tender,' for all purposes for which money can be used, are usurpations of power and merely void.

The several propositions are so blended, and it is so impossible to offer an argument in support of one of them which will not tend to establish the others, that I will not attempt to confine what I have to say to any of them separately. They will stand or fall together.

The proposed discussion necessitates an examination of the legislation of Congress on the subject of money from the beginning. The dates and contents of the several acts are briefly shown in the accompanying note.¹

¹ By section 9 of the act of April 2, 1792, it was enacted that the eagle, or \$10 gold piece, should contain 247 1-2 grains of pure gold, or 270 of standard gold. The half-eagle and quarter-eagle were to be of proportionate weight. The dollar was declared by the same section to be a piece containing 372 1-4 grains of pure silver, or 416 grains of standard silver; quarter-dollars and half-dollars, dimes, etc., to be of proportional weight. By section 11 the proportional value of gold and silver was declared to be as 15 to 1—that is, 15 pounds of pure silver were declared to be equal in value to 1 pound of pure gold. By section 12 standard gold was declared to consist of 11 parts fine gold to 1 part alloy, and standard silver was, by section 13, declared to consist of 1,485 parts pure silver to 179 parts alloy in a total of 1,664 parts. All these coins of gold and silver were declared to be legal tender in all cases.

By section 1 of act of June 28, 1834, the eagle was declared to contain 232 parts of pure gold and 258 parts of standard gold.

By the act of January 18, 1837, the standard of both gold and silver coins was fixed at 900 parts of pure metal to 100 parts alloy, or 9 to 1 in every 10 parts (§ 8); and by section 9 the silver dollar is declared to be 412 1-2 grains of standard silver, and the half-dollar, quarter-dollar, dime, and half-dime of proportional weights. These coins were declared to be a legal tender, according to their nominal amounts, for all sums whatever. By section 10 of the same act the weight of the eagle was declared to be 258 grains of standard gold, and the half and quarter-eagle proportionate weights. These, also, were declared to be legal tender at their face. By the 1st section of the act of February 21, 1853, it was provided that the weight of the half-dollar should be 192 grains of standard silver, and the quarter-dollar, dime, and half-dime proportional. By section 2 these coins were declared a legal tender in sums not exceeding \$5. By the act of February 2, 1862, United States treasury notes were declared a legal tender in all cases as between man

It is an elementary and axiomatic proposition that Congress possesses no powers which are not granted to it by the constitution of the United States. It has not even any *general grant* of power. Each particular power which the convention proposed to give to it is enumerated, defined, and conferred. In most of the *states* a general grant of "legis-

and man, whether in respect of past or future contracts. By the act of March 18, 1869, it was declared that the faith of the United States was "solemnly pledged to the payment in coin, or its equivalent, of all the obligations of the United States not bearing interest, known as United States notes, and of all the interest-bearing obligations of the United States, except in cases where the law authorizing the issue of any such obligation has expressly provided that the same may be paid in lawful money or other currency than gold and silver."

By section 13 of the act of February 12, 1873, the standard of gold and silver coin was left, as to the *pure* metal in each kind, the same that had been fixed by the act of 1837, but the *alloy* of the gold coin was debased. By section 14 the eagle was declared to be 258 grains of standard gold, half and quarter-eagles and dollar and three-dollar pieces of proportionate weight; and these coins were declared legal tender in all cases. By section 15 the silver coins of the United States were declared to be a trade dollar, a half-dollar or 50-cent piece, a quarter-dollar or 25-cent piece, and a dime or 10-cent piece, and the weight of the trade dollar was to be 420 grains troy, "the weight of the half-dollar shall be twelve grams (grammes) and one-half of a gram (gramme)," the quarter-dollar and dime were declared of proportionate weights, "and these coins shall be a legal tender at their nominal value for any amount not exceeding \$5 in any one payment." (By the act of July 28, 1866, the *gram* was declared to be equivalent to 15.432 grains *avoirdupois*.)

By section 16 of the same act the minor coins of the United States were declared to be a 5-cent piece, a 3-cent piece, and a 1-cent piece; "and the alloy for the 5 and 3-cent pieces shall be of copper and nickel, to be composed of three-fourths copper and one-fourth nickel, and the alloy of the 1-cent piece shall be 95 per cent. of copper and 5 per cent. of tin and zinc, in such proportions as shall be determined by the director of the mint," * * * "which coins shall be a legal tender at their nominal value for any amount not exceeding 25 cents in any one payment."

By the act of February 9, 1793, and the act of April 10, 1806, Congress had added to the exercise of its power to "coin money, regulate the value thereof and of foreign coin," the claim of making these foreign coins a "legal tender" in all cases at their established rates. This right was also asserted (and apparently without challenge) in many other acts. The earliest appears to be that of August 4, 1790. But it is sufficiently plain that the assertion of the claim began in the administration of Washington, and the acts need not be cited in detail.

tive power" is made to the general assembly by the state constitution, and then follow, in some state constitutions, the limitations and restrictions upon this general grant. Under such a constitution, of course, the general assembly will possess every legislative power the exercise of which is not forbidden. But, under the constitution of the United States, Congress has no general grant of powers at all; and, each power which is granted being enumerated and defined, it follows that, when any particular power is claimed for Congress, the burden of showing that the claim is rightful rests on him who makes it. He must find it among the enumerated powers given by the constitution to that body. This would have been the necessary construction of that instrument, according to all sound and safe reasoning, if it existed now as it was adopted in 1788; but the 10th article of the amendments takes away all possibility of doubt. "The powers not delegated to the United States by this constitution, nor prohibited by it to the states, are reserved respectively to the states or to the people." Here we are warned, by the words of the constitution itself, to claim nothing but what is plainly given, and unless we can find in the constitution an enumeration of the power claimed among those which are granted, it must be perversity, not logic, which persists in making the claim. A very short examination will satisfy any one that this power is not enumerated among those granted to Congress, and this should be the end of the controversy. But it is claimed that the power is *incidental* to those granted in express terms to Congress respecting money (5th subd. of § 8 of Art. 1), to which there are two sufficient answers: *first*, that all the powers which the constitution proposed to give to Congress respecting money are carefully enumerated, defined, and conferred in and by the passage cited, and the maxim, "*expressum facit cessare tacitum*," excludes the idea of anything more being intended; and, *second*, the constitution itself, in section 10 of Article 1, concedes and declares that the matter of regulating tender belongs to the entity having possession of the general subject of contracts; that the states are this entity; and that it is expedient for the

general good that the powers thus belonging to the states be placed under the restrictions which that 10th section prescribes. It would seem impossible to deny that this was the view of the framers of the constitution, plainly deducible from their own words, unless the contestant is prepared to say that the states would not have any power to do any of the things prohibited by that section if the prohibition were absent, which would amount to saying that the prohibition is wholly unmeaning, and, moreover, it would contradict what all men know. History tells us that, in the interval between 1776 and 1787, many of the states *did* make many things besides gold and silver coin a tender for the payment of debts. The mischief ensuing was by no means one of the least of those that led to the meeting of the constitutional convention. That body found the states in the actual possession and most pernicious exercise of this baleful power, and, not attempting to take it away entirely, imposed limitations upon its exercise which, while they recognized its existence, took away its capacity for abuse. In the plainest language the constitution says: "The states, which possess jurisdiction of the matter of tender of whatsoever in payment of debts, shall henceforth be subject to this limitation: they shall make *gold and silver* coin *such tender*, and *nothing else*."

While no accurate thinker will admit that a general grant of "*legislative* power" to the general assembly of a state sanctions the passage of *special acts* (so called) which, instead of furnishing a general rule for a *class* of cases, altogether transcend the sphere of legislation and attempt to decide a particular *case* in flagrant violation of established principles it is believed that no one will deny that under such a general grant of power the general assembly has control of the whole domain of contracts. What formalities and ceremonials shall be required in contracts of a particular kind; what contracts shall be declared unlawful; in what manner contracts may be discharged; in what manner their performance may be enforced; these and many other matters connected with the making, validity, and enforcement of contracts undeniably

long to the general law-making power. As the enforcement of any contract may lead to a judgment for a money debt, and as the performance of a large class of contracts consists in the payment of money, the manner in which payment shall be made may fitly be the subject of legislation. Suppose A owes B \$10,000. B may be a judge, hastening to the court-house to take his seat on the bench; or a physician heeding a call to a sick bed; or he may be about to close his house for the night and retire with his family to repose. Or A, accompanied by several porters, to accost him in the street, dismiss the porters, and tender him the bags containing the coin, or for A to make an ostentatious delivery of his coin to him after the close of banking hours in the evening, so as to expose him to the enterprise of house-breakers, surely such behavior as may be corrected by statutory provision, if the unwritten law does not furnish a sufficient protection. This unwritten law, if it exists, is no part of the federal constitution, but belongs to the jurisprudence of the state of which both A and B are citizens; and it follows that, whether such conduct be regulated by written or unwritten law, it is by the state that the remedy is applied. Again, if judgment be given that the debtor shall pay the creditor a sum of money, the mode of enforcing this sentence unquestionably rests with the state the courts of which pronounce it. Whether the real or personal property of the debtor shall be seized and sold in satisfaction of the debt; if so, then whether unreservedly or with large or small reservations; whether, in default of payment, the person of the debtor shall be liable to arrest—all these things are clearly of state cognizance. I am ashamed to insist upon points so plain. Every one knows that in the times immediately preceding the adoption of the federal constitution there was abundant example of state legislation whereby a creditor, having a judgment for \$1,000, was obliged to declare it satisfied if his debtor delivered to him (*e. g.*) a certain number of pounds of tobacco, or a proper number of acres of unproductive land, at a valuation to be fixed by a jury of debtors. The remedy for all this lay, not in altogether taking away the

right of the states to legislate on the subject of **contracts**, of tender in satisfaction of a contract (this would **have been** a blow at their autonomy which would not have received the vote of the delegation of a single state in the **convention** which framed the constitution), but in forbidding **an abuse** of power in connection with this general subject which **every** fair-minded and intelligent man saw and lamented. **All such** abuse comes, *at best*, from sickly sentimentalism and **muddled** thought; nine times in ten it is powerfully aided by downright dishonesty. But experience had shown that **this combination** was *habitually* too strong for justice, and there was nothing for it but to forbid, as an illegal thing—as **something** opposed to the organic law—any such vagaries for the future. This, and nothing more, was the extent of the prohibition. The remedy was nicely proportioned to the mischief. There was no thought of transferring to the general government a power at that time lodged with and exercised by the **states**; but only of so limiting that power as to make the future exercise of it by the states incapable of working injustice.

To show the sense of the convention as to the propriety or the possibility of giving to the federal government power to make anything whatever a legal tender, see the debate on the adoption of the clause reported by the committee (§ 8 of Art. 1, 2d subd.): "To borrow money and emit bills on the credit of the United States." I will not encumber this article with what every one can read in Elliott's Debates, pp. 434-5.

It must be admitted that if Congress has the power to declare *what* shall be legal tender, the states do not possess it. The power of determining what may be determined in more ways than one can never be reposed in two independent bodies. One must have it to the exclusion of the other, for the possession of it by one is incompatible with the like possession of it by any different body. It cannot be necessary to illustrate this. But if Congress has the power claimed at all, it has it *without limitation*. If Congress can make gold or silver coin a legal tender *by any independent legislation*, there is nothing to prevent its making iron or copper coin, pieces of leather, or bits of paper, shells, or oak leaves, or

it not, legal tender also. This I take to be incontrovertible. I have denied to Congress the possession of the power at all, and have successfully defied any advocate of it to point to the grant under which alone it can be fairly justified, according to any rule of construction with which I am familiar. But if it can be claimed as a right inherent in the very nature of the government established by the constitution, then, clearly, there is no limitation upon the exercise of the right. There *is* a limitation, but it applies to the states alone. In the same section in which it occurs there is an absolute prohibition on the *states* to "coin money," "grant letters of marque and reprisal," "pass any bill of attainder," &c. Now, of these powers some are given to Congress and some prohibited to Congress, as well as to the states. But nowhere in the constitution is there a prohibition to Congress of jurisdiction over legal tender, and nowhere is there any limitation of any existing jurisdiction. If, then, Congress has the power *at all*, it has it without reserve, and can make *whenever it will receivable in satisfaction of any debt*. This is the necessary conclusion, and surely it is monstrous enough to make any one in his senses distrustful of the premises which lead to it.

But it is said that "it *must* be that Congress possesses this power, for it has exercised it from the beginning without challenge. The men who made the constitution put this construction on it; Washington, the president of the convention, approved, as president of the United States, an act of Congress—nay, several acts—asserting and exercising the power; Madison, Hamilton, and a host of others who were members of the convention, participated in these acts. In 1794 and in 1837, when Jackson was president, and Benton, Calhoun, and Webster were senators, acts were passed of the same character. This is the *cotemporanea positio* which has so often been declared to be of overwhelming strength in the eye of the law; and, after so long a line of precedents, the question must be treated as absolutely settled by all men who believe in stability and fixedness." This is the argument in favor of the power, so far as

it rests upon authority. I admit that it is of very plausibility. It is by far the best argument of which claim admits—indeed, I consider it the *only* one—and I endeavored to state it as strongly as possible. If it can be shown that Madison, or Benton, or Silas Wright, or Calhoun, or Webster ever advocated or admitted this power, I am ready to concede that authority can go no further. But I deny that any of these men ever did any such thing.

My position is that, in all the legislation before 1853, when I fell from Congress on this subject is simply a declaration of consequence, the drawing of an inference—not the addition of a quality to the subject-matter which, up to that moment and except for that declaration, it did not possess. If I make this appear I shall have broken all the force of the argument from authority. It was for the purpose of the full consideration of this question that so full a quotation was made from the various acts of Congress from 1792 to 1873. In examining the first it is well, however, to cite more exactly the words of its 16th section: "That all the *gold and silver* coin which shall have been struck at and issued from the said mint shall be a lawful tender in all payments whatsoever. What was Congress proposing to do in this act? Manifestly in fulfilment of one of its most pressing duties and the execution of one of its clearest powers, "to coin money and regulate the value thereof," it established a mint; ordered the coining of several pieces of gold, silver, and copper, the standard of the first two metals being fixed; declared the weight of the eagle, the half-eagle, the dollar, etc., and directed that these pieces thus coined should be issued with an authentic certificate of their respective denominations or values. Thus, a certain piece of standard gold would be issued, with a certificate, which no one in the United States could gainsay, that it was of the required fineness, and contained enough gold of that fineness to be worth \$10. So of the half-eagle and the quarter-eagle, and so of the silver dollar and its submultiples or divisions. Now, let us imagine A to owe B \$1,000. He takes either 10,000 dimes, or 4,000 quarter-dollars, or 2,000 half-dollars, or 1,000 dollar pieces,

400 quarter-eagles, or 200 half-eagles, or 100 eagles, and tenders any of them (making his own choice of any lot needed) to his creditor. Will he require the aid of any act of Congress, or of any state, to legalize and validate this tender and entitle himself, in consideration of it, to a discharge from his obligation to pay \$1,000? Clearly not. He owes his creditor—what? One thousand dollars. What is a dollar? A piece of money, the fineness and weight of which Congress has the right to determine. Thereupon he tenders 1,000 pieces of money, thus determined, and tenders them to his creditor; he owes \$1,000—that is, he is bound to pay \$1,000—to him, and he *does* pay \$1,000 to him. He pays or tenders the *identical* thing he was bound to pay or tender. No act of grace or permission is needed to establish the lawfulness of the payment—to declare that performance is performance. If A owes B 100 horses, and an attempt be made to discharge the obligation on the ground that so many bushels of wheat or so many pounds of tobacco shall be the legal equivalent of each horse, at the option of the debtor, undoubtedly the action of an overruling power will be required to give effect to such a departure from the terms of the contract; a power greater than any state of this Union can exert, and equally beyond the powers of the general government or Congress. But it is equally plain that no act of legislation is needed to enable A to satisfy B, in law and in morals, by delivering to him what his contract specifically calls for, viz., 100 horses. It follows that the 16th section of the act of April 2, 1792, was not of any legal consequence; the act remained, after its addition, precisely what it was before it was added. It was mere surplusage. In all the various acts regulating the value of foreign coin, *and* enacting that a piece of gold or silver declared by Congress to be legally equivalent to so many dollars, or parts of dollars, should be legal tender for so many dollars or parts of dollars, the same ineffectual declaration was repeated. It follows, therefore, that the wholly unnecessary declaration contained in the 16th section of the act of 1792 (limited, as it carefully is, to gold and silver coins therein mentioned and provided for,

did not in any degree add to or detract from what the would have imported had that section been omitted. Was that section, therefore, harmless? As an act of legislation it was harmless, because ineffectual; as a precedent it was full of mischief, and furnishes one in addition to the myriads of other proofs of the fallacy of the maxim, "*plus non nocet.*"

It would be much more correct to say, "*plus valde nocet.*" Like an *obiter dictum*, it is almost always prolific of future trouble. It does no good to the matter in hand, and no harm either, for, by hypothesis, it is irrelevant, but it is full of possibilities for future mischief. As to the explanation of the redundant section I have nothing to offer but conjecture. Every one familiar with the practice of legislative bodies knows how troublesome is the persistence with which some well-meaning, but vain and fidgety, members strive to make "*their mark*" on a measure; how fondly they seek to incorporate an amendment to which they can point as their own. The old jest of the individual who moved to strike out *twenty-four* and insert "four and twenty" illustrates this quality. But some of the sentences which are generally received as carefully condensed legal propositions are curious examples of redundancy and vagueness; and any one who has attempted, on a fitting occasion, to prune the redundancy or remove the vagueness will be able to testify to the difficulty, perhaps the impossibility, of succeeding in the effort.³ There

³ Quite recently, in a constitutional convention, occurred two striking instances of this nature. The old constitution contained in its bill of rights, among other provisions, the following: "No *ex post facto* law, or law impairing the obligation of contracts, or retrospective in its operation, or making an irrevocable grant of special privileges or immunities, shall be passed by the general assembly." In the new draft it was proposed by the committee to make the corresponding clause read thus: "No law retrospective in its operation, or making an irrevocable grant, etc., shall be passed by the general assembly." But it was vainly urged that the latter was quite as comprehensive as the former proposition. By a large majority the redundant expressions were reinstated. The constitution of the same state had from the earliest times contained a declaration that "all persons shall be bailable by sufficient sureties, except for capital offences where the proof is manifest or the presumption great." A recent convention, by its committee, proposed to substitute, "all persons shall be bailable by sufficient sureties, except on charges for capital offences where the presumption of *guilt* is great." But the

a great impatience in the average deliberative body of what are termed "*verbal niceties*;" a great disposition to join any "explanatory" clause; and a tendency, in the interest of a "quiet life" on the part of a leading member, to omit an amendment which is not palpably hurtful. I will not stop to enquire into the history of the passage of the act of 1792. But if it had been reported without section 16, and that section had been proposed as an amendment, we may readily imagine that when the demonstration had been made that it was unnecessary, seeing that the same thing resulted resistibly from what preceded, the reply may have been: "The only objection to the proposed section is that it gives an unmistakable expression of what is already a plain inference. Now, I wish the act to be so plain, so clear on its face, as not to leave any occasion to resort to inference." Under the influence of such suggestions we may well understand that this superfluous section first gained a place on the statute book. Once there, its continuance or repetition in all the acts of similar tenor down to 1853 may readily be understood. In none of these did its insertion add to or take from the effect of the act.

"But," it is urged, "of many of these acts, and notably of those of 1834 and 1837, such men as Webster, Benton, Calhoun, and Silas Wright, admitted to be men of great intellect and thorough acquaintance with the subject of the currency, under the constitution of the United States, were actively engaged in framing the language employed by Congress in legislating on this subject. All of these men were deeply interested in the question; all of them took an active part in the legislation, and nothing can be imputed to negligence." I am not disposed to dispute the force of this objection. It

proposal raised a storm. It was resisted as an attempt to improve upon the phraseology of Thomas Jefferson and Nathan Dane, and this was pronounced to be almost blasphemous. It was to no purpose that the worshippers of these great men were asked the *meaning* of the words as they originally stood, and whether the ellipsis should be supplied by interpolating "of guilt" or "of innocence," and it was just as little effectual to enquire whether bail would not be forbidden, *a fortiori*, when the proof was manifest, if it were denied when the presumption was great.

certainly is extraordinary that none of these penetrating, discerning men perceived the danger lurking in this assertion of power; and, as far as I am advised, I do not think it possible to deny that either they did overlook the assertion—did not perceive that it was made—or, seeing that it was made, acquiesced in it. If, however, it can be shown, not inferentially, but in the plainest manner, that each one of these great men over and over again, in the strongest, most unequivocal language, denied that Congress could make anything but “the money of the constitution,” “gold and silver coin,” a legal tender, it will follow irresistibly that they denied the power of Congress to do anything in respect of money but to “*coin*” it and “*regulate its value*,” and that they only assented to the employment of the legal tender declaration in the sense of drawing an inference and stating a consequence—not at all in the sense of superadding to the gold and silver coin a quality which it did not previously possess. No space would be wasted in citing passages from the public utterances of all these men—Webster, Benton, Calhoun, and Wright—to prove that, one and all, they denied the power of Congress to make anything but gold and silver coin, *money*, in any legal sense. Nothing would be easier than to make the citations, and nothing, I conceive, could be more unnecessary. Every well-informed man knows the fact. It follows that these eminent men never supposed that any word or act of theirs could be quoted in support of the proposition that Congress possessed any cognizance of the subject of tender, for we have already seen that, if Congress really possesses *any* control over this matter, its power is absolutely unlimited.

All these men had passed away from the public stage in February, 1853. Three of them were in their graves; the fourth was in retirement. In February, 1853, occurred the first mischievous exercise of the power asserted so often and so harmlessly before. A glance at the history of 1834, 1835, and 1853 will not be uninteresting. Prior to 1834 there was practically no circulation of American gold in this country. A few eagles, half-eagles, and quarter-eagles had been struck under the act of 1792, but those which did not go to the

elting-pot were preserved as curiosities. In fact, the eagle, \$10 piece, of 1792, containing 247 1-2 grains of pure gold, as much more than ten times as valuable in the markets of the world as the Mexican or United States dollar, containing 12 1-4 grains of pure silver. The proportion established in section 11 of that act (15 to 1) was unjust to gold. The consequence was that prior to 1834 our only coins in general circulation were of silver and copper. The foreign gold coins which occasionally found their way to this country were too insignificant in number and value to be noted as exceptions.

To remedy this condition of things, Congress, in 1834, passed an act declaring the eagle to contain 258 grains of standard gold and 232 parts of fine gold. Nothing was, in terms, said about the standard, but the necessary effect of the act was to lower it. The eagle thereafter contained 1-2 grains of pure gold less than the old eagle of 1792. It was (very humorously) declared by this act that these old eagles should continue to be legal tender for their face.

In 1837 the standard of both gold and silver was changed to what it now is. In the case of both metals it was made 10 parts pure metal and 1 part alloy in every 10. The eagle was made to contain 258 grains of standard gold (or 232 2-10 pure gold). The silver dollar was made to contain 371 2-10 grains of standard (or 371 1-4 grains of pure) silver. The proportion of value between the two metals was not expressly declared, but was thus fixed at very nearly 16 to 1. In fact, respect being had to the pure metals only, it was really 16 to 1.

The act of 1792 had banished the gold coinage; that of 1837 banished the coinage of silver. It turned out that \$10 silver were at that time, in the markets of the world, worth more than the gold eagle of 1837, and, of course, gold rapidly filled the channels of circulation, except where it was banished by bank notes. Silver became scarce, and the resulting inconvenience was seriously felt. Accidental causes aggravated this condition of things. The Ural mountains in Russia, as well as California and Australia, proved to be

large producers of gold, and, no corresponding increase in silver taking place (the mines of Mexico and Peru remain unworked, in great part), it was necessary to readjust the balance of 1837. This Congress attempted, very unskillfully and usurpingly, in 1853. By that act, the *dollar* remained at 412 1-2 grains, the half-dollar was declared to be 192 grains in weight instead of 206 1-4. The smaller fractions of the dollar were diminished proportionally, and this violation of the laws of arithmetic was balanced by a violation of the federal constitution and a repudiation of its own money. It was declared that this silver coinage should be a legal tender only in sums of \$5 and less.

Undoubtedly the Beast here appears—horns, tail, and hoofs. But we had already “lost the breed of noble bloods. Great men had become scarce in Congress, or altogether absent from it, and the time was drawing nigh when a senator, the chairman of an important committee, was able to proclaim, and almost to boast, his ignorance of the distinction between a tariff of protection and a tariff of revenue. This precedent of 1853 may go for what it is worth. For my part, I believe that the actors in it are well entitled to the excuse invoked for those who “knew not what they did.”

At this point I may be asked whether these discredited half-dollars, quarter-dollars, etc., can be made by the states a legal tender for all sums? Can any state declare as law that A, owing B \$100, can acquit himself of the debt by paying to B 200 half-dollars, so called, of the coinage of 1853? My answer is that no state can do this, and the reason for this conclusion is that these pieces are *not* half-dollars. When Congress declared the dollar to consist of 412 1-2 grains of standard silver, and the half-dollar to contain only 192 grains, it asserted, to the extent of its competency, that 412.5 was equal to 192×2 , or 384. In other words, it attempted, of course unsuccessfully, to repeal the laws of number, and, in the attempt, realized an absurdity. The states, by seeking to found legislation upon this absurdity, will realize the same results. But if Congress, in 1853,

and declared the silver dollar to contain 384 grains of standard silver, and no more, then I say that all dollars coined under that act, and all half-dollars *arithmetically* proportioned to the weight of the dollar, might be made a legal tender by the states, any declaration of Congress to the contrary notwithstanding. I pass over the section making 3-cent pieces legal tender in limited amounts. The same observations apply; and now, too, the coin is debased as well as lightened. Congress is on the downward road, and moving with accelerated velocity. It seems, however, to have erred mainly through heedlessness and ignorance. In February, 1862, occurred the first *conscious* usurpation of the power to make anything but gold and silver coin a legal tender—that is, to legislate on the subject *at all*; for, unreasoning and ignorant as was the Congress of that day, it can hardly be supposed not to have perceived that the only question was: "Had it cognizance of legal tender at all?" Any one possessed of discernment could hardly have failed to see that if it had the power in any measure it had it without reserve; that if the legislation of 1853 was warranted, that of 1862 was above challenge.

This profligate and most stupid act, which more than doubled our debt and involved the whole country in that delirium under which gaming was substituted for regular industry and speculation for business, is the plain source of all the unhealthy excitement, followed by the unhealthy depression, which have marked the last fifteen years. It would be a digression to pursue this reflection. It is no answer, however, to say that other countries, which have not been cursed with legal-tender acts and paper currency, are no better off, commercially, at this moment than ourselves. When, until these last disastrous years, were Americans forced to take comfort by comparing their lot with that of other people? During all periods before 1860 our prosperity was exceptional—a contrast to the condition of mankind in less favored lands.

We now come to the act of 1873. Before considering it I desire to say that the act of March 18, 1869, how-

ever it may have been intended, and however it was executed, is in its terms liable to no censure except on one point, which has, I think, escaped notice up to this time.³ It simply declares the promise of the United States to pay a given number of dollars to signify a promise to pay so many pieces of coin—not paper, or what was so falsely called “lawful money,” but coin of the precious metals. At the date of its passage, be it remembered, the dollar of 412 1-2 grains of standard silver was a legal tender in all cases, even according to the language of the acts of Congress. So far as the “United States notes” were promissory notes, issued by the government, they were a legitimate, though an unwise, mode of borrowing money. Their issue was, thus far, an exercise of an admitted power. It was when they were declared to be *money itself* that the absurdity and want of principle of the statesmen of that day became manifest. The act of March 18, 1869, declared that these United States notes, not bearing interest, should be paid in coin; and in respect of these, which, if *any* discrimination were allowable, should certainly have been redeemed out of the *first* money which the United States had, or could raise, we have seen all care forgotten for more than eight years, during which they have fluctuated in value from 60 to 95 cents in the dollar. Only in the last twelve months has an attempt been made to redeem part of them by the repudiated silver coinage of 1873, which in this respect is, as to the fractions of a dollar, nearly a reproduction of the act of 1853. More than 380,000,000 of these United States notes, which the government had

³ I have said there was one particular in which the act of March, 18, 1869, was liable to censure. Like most of the acts of Congress of late years it betrays great want of reflection and care. It declared that the non-interest bearing United States notes should be payable in coin; and, also, the interest bearing bonds and notes of the United States, except where the law authorizing their issue had declared them payable in “lawful money”—meaning what are known as greenbacks. But these last had been, by the same section, declared payable in coin, so that the only effect of this exception was to permit the United States, when one of these bonds was presented for payment to pay it in paper on which the holder was authorized immediately to demand coin. Was this idle ceremony present to the minds of the concoctors of the act?

forced the people to receive as money during all this period fifteen years, while the value of them has varied from 38 to 95 cents in the dollar, and on which large sum *thus drawn from the people by a forced loan* not a cent of interest has been paid, or is payable, are now outstanding, and are held at home. By the acts of the government it has been practically declared that the discredited silver coinage—the coinage which, on its face, sets the laws of arithmetic at defiance—is quite good enough, without a cent of interest, for the large class of public creditors who hold these notes. They received all these promises to pay at par, and were forced so to receive them. There is another class of public creditors consisting of the holders of the interest-bearing bonds of the United States. Many of these were purchased by the holder at 38 cents in the dollar. No one was compelled to take them at all. On these, from the date of their issue, interest, varying from 6 to 4 1-2 per cent. on their face, has been paid in coin, while the actual interest on the sum paid for them was sometimes more than 16 per cent.; and no one able to weigh testimony can doubt that the act of March 18, 1869, was devised and passed with an eye single to the interests of this class of creditors. Its operation was at once, as well as enormously and permanently, to enhance the market value of our interest-bearing bonds, while it is notorious that, in the very year of its passage, the market value of the United States notes bearing no interest reached a point of depression to match which we must go back to the dark times when it was yet uncertain whether we would be a united people.

Nevertheless, I repeat that the bondholder was fairly entitled to the declaration contained in the act of March 18, 1869. He held our promise to pay so many dollars and so much interest. A dollar *ex vi termini* means, and always meant, coined gold or silver. It has always meant this, from the foundations of our government, in morals and in law. So that the bondholder, though he may have purchased our obligations at 38 cents in the dollar or less, was well warranted in claiming the fulfilment of our promise to pay so

many dollars, principal as well as interest, according to the tenor of the bond. When the price he paid for the security was smallest, the prospect of payment seemed most precarious. He took the risk, and is fairly, legally, morally entitled to the advantage he won by our success in suppressing the rebellion. On this point I think there can be no honest doubt. Moreover, I consider the act of March 18, 1869, to be no enactment at all; no creation of new rights; no introduction of new principles. It was merely a declaration of existing law. It declared the bondholder to be payable in coin; and nothing short of that was true of any obligation to pay a dollar, or many dollars. But what was "coin" as then known to the law? Silver dollars, gold dollars, three-dollar gold pieces, quarter-eagles, half-eagles, eagles, and double-eagles. All these constituted the coin of the United States; and each of these pieces was a legal tender according to its face, and in all cases, no less by its own nature than by the superfluous declaration of Congress to that effect. Under these circumstances suppose A to have been bound, in 1870, by an obligation maturing in 1875, to pay B \$1,000 in coin; what is the privilege of A if the one or the other metal should depreciate in the market? Can it be different from what it would have been if the obligation had matured before 1873? In each case the debtor, being held to pay only coin, has the option of gold or silver coin. At all times after 1834 and before 1853 he would gain by paying in gold pieces. About 1870, and since, he would gain by paying in silver dollars. He clearly has the option, and even the authors of the act of February 12, 1873, admit that it was his, unless by that act it was taken away. The question is: Did Congress succeed by that act in thus taking it away? That the attempt was made is undeniable. The intention of the framers of the act is manifest. Silver, from various causes—partly by its repudiation in Europe and partly by its largely increased production in the United States—having depreciated in value, one of the contingencies attending the investment of the bondholder had turned to his disadvantage. We have seen that two

other and most vital contingencies had resulted in his favor. Of these he had received, as he was justly entitled to receive, the full benefit. Another contingency threatened loss to him, and straightway his friends in Congress were anxiously and industriously devising means to save him from loss; which, of course, could be effected only by placing on the other party to the contract the loss that fortune had, for once, assigned to the bondholder. The case was very plain. The bondholder had entered upon a speculation when he took our bonds. If we failed to suppress the rebellion he *might* be unable to collect principal or interest of the bonds he bought. If it should be suppressed, however, he would have an excellent security for his money, and an enormous interest on his investment; in some cases exceeding 16 per cent. per annum, to say nothing of a nearly threefold return of the principal. These were the chances which *he* contemplated and which *we* contemplated. Already the principal event had been determined in his favor, and he had reaped the full benefit of it. It was admitted, as justice required, that the bonds were payable, of right, *in coin*; and, the rebellion having been effectually suppressed, our ability to pay was no longer a question. The bondholder had, then, made a bargain which turned out immensely lucrative. This, of course, was no reason for depriving him of any of his advantages. Governments, on the other hand, have nothing to do with sentimentalism. In dealing with the public creditor, there is no place for liberality. Even-handed justice and perfect good faith he is entitled to, but to nothing more. It is plain that there was nothing in the condition of the parties (the people and the bondholder) to suggest indulgence or favor to the creditor. Thus far he had gained beyond all sober expectation, and even beyond his wildest dreams.⁴ The

⁴ The full measure of the bondholder's profits is, I think, hardly understood. He bought mostly in 1864. During that year the United States paper dollar was, on an average, worth less than 50 cents in coin. During a good part of the year \$265 in paper would buy only \$100 in gold. Then the paper dollar was worth nearly 38 cents. For a short time it was worth less than 35 cents. This was when \$100 coin would buy \$287 in paper. By investments, when the paper dollar was worth 50 cents in coin, the capitalist

other party—that is, the public or the people—weighed down by a wasting war, an enormous debt, and all the disorders consequent upon revolution, was painfully exerting itself to bear a load of taxation which a few years before, and when our strength was unbroken, would have been thought intolerable. *In uprightly doing strict justice by the act of March, 1869, we had done more in behalf of the creditor than any government had ever, in like circumstances, done before.* Indeed, there were many of our own people who thought (erroneously, as it seems to me) that *more than* justice had been done: that liberality and favor were at the bottom of the measure of 1869; and that there was room to impugn the motives of those who promoted it. All this I condemn. The measure was right in itself, so far as the bondholder was concerned. If it can be shown that any member of Congress took a bribe for doing his duty, he is a dishonored scoundrel. But, until evidence of that kind is produced, no one should be aspersed for merely doing his duty.

By one of the accidents, the contingencies, to which all human affairs are subject, one of the precious metals, which had from the beginning been coined into, and known as, money by all nations, ancient and modern, heathen and christian, civilized and uncivilized, had become, in 1871–2–3, unexpectedly abundant. Not only was the demand for it greatly lessened, but its production was largely increased. What was more, its increased production was traceable to mines situated in our own land and worked by our own people. The onerous obligations which

realized 12 per cent. interest, and when the bond was redeemed he doubled his principal. Investments made when paper was lowest yielded the capitalist 17 per cent. interest, and trebled his capital when the bond was redeemed. Now, I repeat it, the capitalist is entitled to all these benefits. He made, as it turned out, a capital bargain; but there was an element of risk about it which should not be forgotten. But to give to him, in addition to all these advantages, a *bonus* of from 5 to 10 per cent. on the double or treble of the capital he invested, and to denounce as inflationists and repudiators (they might as well be termed burglars or smugglers) all who protest against the spoliation of the people, can be accounted for only by supposing that these who use this language are fools, or that they believe those who hear it to be so.

d strained our resources were materially lightened. This alleviation was doubly welcome—welcome for the relief it gave, and, perhaps, still more welcome for the *imagination* of the relief. Every one knows how sensitive are the perceptions of the commercial world. At present there is, and for more than nine years there had been, from the fluctuations in value of the currency, a want of confidence in the success of any enterprise involving the use of money. This feeling had been very instrumental in producing what all men dreaded, and was still more potent in paralyzing effort and preventing the attempt to embark in any business. All who can remember the last nine years can fix the commencement of the reaction following the mad revel induced by the flood of irredeemable paper currency, and the progressive severity of the stress which this reaction laid on the whole commercial world; and every one knows with what anxiety all persons in debt awaited the final shock of a complete return to specie payments. At this time, as I have said, causes were in operation which promised a material mitigation of, if not entire relief from, this dreaded shock. The Franco-German war ended with the exaction from France, by Germany, of an enormous sum of money, and a determination on the part of Germany to put aside the use of silver money. This was by far the most important factor in depressing the value of silver. Its effect was at once foreseen by foreign capitalists and by holders of our bonds at home and abroad. And what is certain is that, simultaneously with this perception of the fact by these classes, a movement was made by men entrusted with the duty of representing the public interests in Congress, *to subordinate those interests to the demands and profits of capitalists who had already reaped such inordinate gains from the purchase of our securities.* A bill was introduced into the House of Representatives by Mr. Hooper, of Massachusetts, which was debated and practically settled in the first session of the Congress which met on the first Monday of December, 1871, though it did not finally pass until the 12th of February, 1873. The effect of this act (assuming that Congress had power to pass it) was to take

away from the people the option of paying its debts in that one of the two kinds of coin which was admittedly legal tender on the 11th of February, 1873, and in which altered circumstances made it comparatively easy to pay its obligations, and to impose on them a burden which they had never assumed, nor intended to assume. It involved an enormous increase of the public debt; an increase which every capitalist knew was certain to be more apparent in a few months than it was in the beginning of 1873, by the inevitable development and unfolding of causes then in full operation, but not visible to the general eye; and it deprived the debtor, both public and private, of the immense benefit which would have been given by the anticipation of the relief certain to flow from this improved condition of his relations to the public and private creditor. It also removed to an indefinite distance the prospect of a return to specie payments, and added new terrors to that prospect. In 1870 any one owing a debt of \$1,000, payable in coin in 1876 might have made his arrangements for collecting 1,000 silver dollars, each weighing 412 1-2 grains of standard silver, and discharging his obligation therewith. But after the 12th of February, 1873, not only was the weight of the silver dollar increased nearly 2 per cent., but even with this heavier and more valuable dollar he was disabled from paying his debt and he was told, in a language which became quite intelligible as time wore on, that he must pay in gold, worth more than 10 per cent. premium, the promise he had made to pay in silver coin. This was a sad, oppressive, and unjust sentence on this debtor, but he was not the only person crushed to the earth by the edict. The operation of the repudiation of silver in England and Germany, and the increased production of that metal in the United States, and its repudiation here also, actually brought the price of the silver dollar of 412 1-2 grains below that of the United States note promising to pay one dollar. For the first time since 1862 this cheat, which was falsely called "lawful money" when it was first forced on the acceptance of the people, and which for more than twelve years had fluctuated in value

nously—which at one time was worth less than 35 per cent. of its face—became worth 92 cents in the dollar, while the silver coin of 412 1-2 grains was worth only 91 cents.

At this time it had actually occurred that, almost or altogether unconsciously, we bridged the chasm which had separated us from a specie currency. Specie payments, if not resumed, were on the eve of resumption, and nothing but an artificial obstacle to that resumption could prevent its accomplishment. No one can dispute that every requirement of good faith and scrupulous justice would have been met by the payment to the public, as well as to the private creditor, on the 11th of February, 1873, of one dollar of 412 1-2 grains standard silver for every dollar for which our obligations were held. It was competent for Congress to have ordered the purchase and coinage of as many tons of silver as would enable the government and the private debtor to acquire the power withal to pay all outstanding debts. Had such coinage been made, the United States, so far as the silver coined belonged to the public, could have used it to redeem its interest-bearing bonds *and its notes which bore no interest*, and whose non-payment for so many years was so black a scandal to the public faith. Any one having these notes could with them procure the dollar pieces; and with the dollar pieces he was entitled to discharge, not only in the strict sum of law, but in that of the most scrupulous conscience, all debts contracted since 1837. There can be no doubt of this.

All these possibilities the Congress of that day, so far as it possessed the power, deliberately overthrew. I by no means intend to charge the sin of this act exclusively on Mr. Hooper in the House and Mr. Sherman in the Senate. These men were, indeed, the most active in pressing this measure to its consummation; but they were not the only men in Congress, nor were they a majority. If any man of sense, industry, and courage had examined this bill, exposed its tendencies, and urged its rejection, the appeal could scarcely have been effectually made. But no man appears to have done this.

Upon the final passage not even the ayes and nays were called. The shameful negligence and incapacity with which the minority, during the ten years before 1873, was accustomed to loiter through the sessions of Congress, are to blame for much of the vicious legislation which this minority failed to oppose and protest against. I make no defence for the acts of the majority; but I say that the minority, by negligence, indolence, and systematic absence from the halls of legislation, "*paired off*" with some member of the majority, has disabled itself from putting on the men who perpetrated an unjust and unconstitutional piece of legislation the *whole* infamy of the measure. Part of it, at any rate, belongs to those whose duty it was to prevent such legislation, but who did not lift a finger in the effort.

By section 15 of this act the weight of the silver dollar was increased from 412 1-2 to 420 grains. By the act of 1853 the weight of the *half-dollar* had been declared to be 192 grains (instead of 206 1-4, or the half of the dollar piece), but this was done by a section which did not mention the weight of the silver *dollar*. Apparently the Congress of 1873, or the cunning men who were the patrons of this bill, imagined that it would be better to veil this contradiction under the obscurity of an unfamiliar term. Most men would have been startled if, *in the same section*, the weight of the dollar had been declared to be 420 grains and that of the half-dollar less than 200. Hence the artifice was adopted of saying that the half-dollar should be "12 grams (grammes) and one-half of a gram (gramme)." Now, this is a new word for American ears. In order to understand it we refer to the act of July 28, 1866, and find that Congress has legalized the "metric system," and defined the French *gramme*, or the Anglicised *gram*, to be equal to 15.432 grains *avoirdupois*, thus making the half-dollar of 1873 weigh 192.9 grains *avoirdupois*, while the *whole* dollar weighs 420 grains *troy*. I am curious to know if any one supposes that this mystification was unintentionally or innocently employed. At the very best it is pitiful and laborious

ling; but it has the appearance of being something much worse. It was then declared that these silver coins shall be a tender only in sums of \$5 or less.

This act of 1873 has the merit of consistency. In all former currency bills the quality of being a legal tender, even for the smallest sums, had been confined to compositions which either gold or silver formed a part, and to engraved paper. Now, for the first time, coins of copper, nickel, tin, and zinc were declared a legal tender. (§ 16.) It is true that they were so declared only for the purpose of small payments; but he must be dull indeed who fails to perceive that if Congress possesses the power of making these base metals a legal tender for a debt of 25 cents, or one-fourth of a dollar, it rests with the discretion of that body to make them a legal tender in sums of tens of thousands of dollars. There, then, is the claim to have and exercise this astounding power. Is this claim well founded? We have seen that it is not. To repeat the demonstration would be worse than useless. Either the reasoning employed is unanswerable, in which case the conclusion announced cannot be denied, or it is illogical and the conclusion is a fallacy. But I am told that at the power of Congress to make what it will a legal tender has been solemnly affirmed by the Supreme Court of the United States, following the decisions of the courts of many states, and that the question is no longer open.

I am aware of the decisions of the Supreme Court of the United States and of the courts of many of the states on this subject,⁵ but I cannot accept the question as settled.

⁵In *Hepburn v. Griswold*, 8 Wall. 603, decided in 1870, the court, by 5 to 3 (Chase, Ch. J., and Nelson, Grier, Clifford, and Field, Associate Justices, in the affirmative, and Associate Justices Miller, Swayne, and Davis in the negative), held the act of February 26, 1862, to be unconstitutional. In the case of *Knox v. Lee*, 12 Wall. 457, decided in 1871, the same act was held to be constitutional by 5 to 4 (Associate Justices Miller, Davis, Swayne, Strong, and Bradley in the affirmative, and Chase, Ch. J., and Associate Justices Nelson, Clifford, and Field in the negative). In the case of *Metro-Bank v. Van Dyke*, 27 N. Y. 400, decided in 1863, the same act was declared to be constitutional by Associate Justices Balcom, Wright, Emott, Martin, and Rosenkranz. Chief Justice Denio delivered an able dissenting opinion, in which Selden, associate justice, concurred.

Not to speak of the very even balance of authority in the two cases in the Supreme Court of the United States, no man of discernment can shut his eyes to the considerations which dictated the later decision. They were not juridical. Besides, all that was decided on the last occasion, all that was obtained the sanction of a bare majority of the court—majority which, until the retirement of Mr. Justice Grier and the appointment of Associate Justices Strong and Bradley, was of a different way of thinking—was that the blinding, bewildering, overmastering necessities of the war raging when that act was passed may have left to Congress no resource but to make rags a substitute for the precious metals, and not only to levy a forced loan to the government by means of the legal-tender act, but to confiscate the property of all existing creditors in the same interest; that *if* this necessity really existed it justified the act, and that whether it existed or not was a question for Congress alone not to be reviewed by the judiciary.

This, and nothing but this, was the ground on which the *constitutionality* (?) of the act was upheld. In the opinion of four of the majority, the presence of an immeasurable and unmanageable danger was essential to give color to the plea of necessity. It is impossible to read the opinion of the court, delivered by Mr. Justice Strong, without being struck by this feature of it. It is true that Mr. Justice Bradley, concurring in the judgment, carried his views still further, and (12 Wall. 566-7) declined to confine the exercise of this enormous power to time of war. He held that Congress was the exclusive and absolute judge of the necessity of the measure and of the occasion for its exhibition, and if the reasoning of Chief Justice Marshall, in the case of *McCulloch v. State of Maryland* (4 Wheat. 416), be sound at all, it is difficult to deny the conclusions reached by the clear-sighted dialectician who deduced its inexorable consequences in 1871.

Without pausing to remark that in the first of the legal tender cases decided in the United States Supreme Court there were five judges against and three in favor of the con-

tionality of the act, and in the second five in favor of and against it, we are forced to consider the reasons which governed each decision, and it cannot be a matter of indifference that the construction of the constitution contended for by those who upheld the act virtually abolished *all* constitutional restrictions upon the powers of Congress. Instead of a federal government being one of enumerated and defined powers, it becomes, under the rule declared by the majority of the court in 1871, one whose powers enlarge and multiply according to the opinion entertained by Congress of the necessity, or even the expediency, of such enlargement or multiplication at any particular crisis. It is one of the smallest objections to this reasoning that, according to it, the same thing may be within the powers or beyond the powers of Congress, according to the opinion entertained by a majority concerning the gravity of the situation—that is, that the standard of constitutionalism may shift from week to week and year to year. I say this is one of the smallest objections to this mode of dealing with the matter; for, by the adoption of this test, the constitution itself, the meaning of which we are supposed to be investigating, is for all practical purposes thrown aside, and an absolute despotism is substituted for a carefully limited government. This result is plainly seen and mournfully insisted on by those of the Supreme Court who denied the constitutionality of the legal-tender act. In the case decided in 1870 it is stated as a controlling reason why the argument in favor of that act should be condemned. In the case decided in 1871 it is recognized and lamented as the appalling consequence of approving that argument.

If ours were in any true sense a popular government; if the people remembered that they were really the ultimate depositaries of all power, and that every one by them temporarily clothed with authority was strictly accountable to them for its abuse; and if, instead of an indolent, spiritless acquiescence in every act of usurpation, there were an intelligent challenge and vigilant scrutiny of every even doubtful act of administration, such events as the decisions

recorded in 12 Wallace and the enactment of February 1873, would either be altogether impossible, or the agitation growing out of them would long ago have convulsed the land. It is deeply disgraceful to the intelligence of the American people that such a revolution as was proclaimed by the decision of 1871 was received without any apparent sense of its pernicious nature. We boast loudly enough of the diffusion at this day of intelligence through the whole community. It is claimed, moreover, that this diffusion is not effected at the expense of that superior knowledge which was once the possession of a few only. The assumption is that a majority of the many are now as well-informed, as intelligent, as competent to consider the most important subjects as the favored few of a past age. Yet, more than one hundred years ago Burke, speaking of the inhabitants of the British colonies who a short time after vindicated their independence and laid the foundation of the United States of America, remarked that so far-sighted were they, so ardently did they love liberty, and so cordially did they hate any encroachment on it, that they tested and condemned a proposed measure in advance of experience by the badness of the principle it embodied. "They augur misgovernment at a distance, and snuff the approach of tyranny in every tainted breeze," was the eloquent close of his eulogy on our forefathers. How have we fallen! This spirit, this intelligence, this statesmanlike prevision which were one hundred years ago predicable of the British colonists cannot in the last quarter of the nineteenth century be claimed by the people of the United States!

Will it be said that to have remonstrated indignantly against this judicial repeal of the limitations of our constitution would have been idle, and that Americans are, notwithstanding all that is said, fully alive to any practical encroachment upon their liberties, and ready to repel it? This cannot be said truly. In 1871 occurred this judicial overthrow of the constitution. In 1871-2 was introduced, and in 1872-3 was consummated, the act which plunged the country into the distress which for four years has been grow-

with a continually darkening progress. Now, what was the condition of things on February 1, 1873, and what was the operation of the act passed on the 12th of that month? The whole country stood indebted to the public creditors, and so were the holders of the interest-bearing bonds and of the United States notes which bore no interest, and never had borne any, in a large sum, exceeding \$2,500,000,000. I take this sum in order to be within the mark; I do not wish to overstate the case. Besides this enormous public debt, the states, the cities, the counties, and individuals were largely indebted. In many cases—indeed, in a large majority of them, practically in all of them—the debts had been contracted when what was called a dollar was worth much less than 100 cents. In exchange for many of the obligations to pay \$1,000, for example, the obligor had received, in lieu of \$1,000, what was confessedly worth in the market at that time only \$700 or less. It is not intended that this furnishes a reason why the obligation should be repudiated. Nothing is further from my thoughts. I am only describing the condition of things in the beginning of 1873. It has already been shown how enormously fortunate the holders of the *bonds* of the United States had been. Through the operation of similar causes *all creditors* were benefited by the appreciation of the paper which, when the debt was contracted, the debtor was compelled to treat as money. It was then accepted by the debtor as money. It had so nearly become equal in value to money—that is, to coin—that the creditor was an excessive gainer. I have no means of computing the amount of debts owing by the states, counties, cities, corporations, and individuals of the United States in the early part of 1873, besides the public debt of the whole country, which is understated at \$2,500,000,000; but it was hardly less than \$3,000,000,000, and, probably, was twice that sum. For some time past all undertakings had languished. All persons, whether creditors or debtors, were averse to investing money in any business enterprise, because of the shock to which all looked forward when specie payments should be resumed. It was assumed that nothing

could prevent that shock. It might be somewhat mitigated but it must come, and all feared it would be disastrous. Men in business, and especially all who were at all in debt (which comprised a large majority of them), anticipated with dread, and those who were not in business refrain from all enterprises, for fear of incurring a debt which might prove ruinous. For five years the contraction necessary for the resumption of specie payments had been going on. But it was almost universally felt that the end had not yet come—that it *would* come when specie was the currency; and with a shivering foreboding the community looked forward to the consummation.

Now, suppose that on February 12, 1873, instead of being dictated to by the act of that date, the people of the United States had been authoritatively addressed to the following effect: "You have, through war and revolution, been made subject to an enormous public debt. You are in nearly every state of the Union loaded with state debts, city debts, and county debts. Besides this, many of you are largely indebted as individuals, and are members of indebted corporations. All these debts imply an obligation to pay coined dollars, and one particular kind of coin has become so valuable, and therefore so hard to get, that to compel you to pay in *that* will add largely to all the burdens, public and private, of the whole people. Up to this time, for the last thirteen years, every matter that was subject to contingency has turned out to the advantage of the creditor and the disadvantage of the debtor. Recent events have given an advantage to the debtor. By the terms of his contract, even if most rigidly construed, he possesses the option of paying for each dollar of his debt a piece of coined standard silver weighing 412 1-2 grains. Such a payment satisfies the utmost demands of law, equity, and conscience. This piece of silver has now become, by the action of European governments and the discovery and working of large mines of silver in the United States, nearly as easy to get as the promise by the United States to pay a dollar which, nine years ago, was worth less than 40 cents. Hence the dreaded shock of resumption may be regarded as

langer which is past. Resumption has come, and you are not hurt by it. Instead of estimating your public and private burdens by the standard of gold, you are by the plainest and most rigid principles of law and morals entitled to estimate them by the standard of silver. This at once lightens the public debt by nearly \$200,000,000. It lightens your other burdens by a sum which may be variously reckoned at from \$300,000,000 to \$600,000,000. But, better than all, you are hereby relieved from that anxiety, paralysis, and stagnation which for more than five years have almost destroyed industry and enterprise."

No one, I imagine, can doubt that the people of the United States, hearing these tidings, examining into the truth of them, verifying them, and acting upon them, would have presented a very different picture from the same people during any one of the four last years, and contrasting as forcibly as can be with their actual condition. We know that none of these things were said. What was *done* must now be told.

Congress passed an act keeping the gold coinage at its old figure substantially, and making this gold coinage the only legal tender for debts exceeding \$5. It increased the size and weight of the silver dollar by 7 1-2 grains of standard silver, raising it from 412 1-2 to 420 grains. The half-dollar, quarter-dollar, etc., were left practically unchanged, but from all these silver coins, including the dollar piece, was taken away (so far as Congress could take it away) the capacity for paying debts exceeding \$5.

Practically this act proclaimed to the people of the United States on February 12, 1873: "You are legally bound to pay the public creditor \$2,200,000,000 bearing interest and \$400,000,000 bearing no interest, in silver coin. The silver dollar contains 412 1-2 grains of standard silver. Gold has become more valuable than its legal equivalent in silver. You naturally, therefore, will incline to pay the bondholder in silver. But it is hereby decreed that you shall pay him in gold. The law of your contract gave you the option of paying the debt in gold or silver coin. This option is taken from

you and given gratuitously to the public creditor. As to your other debts, the decree further is that, if they exceed \$5, they too shall be paid in gold or its equivalent. They are not to be paid in silver. It is to no purpose that you urge that when the debt was incurred the understanding of both parties to it was that the creditor could demand, at most, only 412 1-2 grains of standard silver for each dollar of it. And it is equally idle for you to say that the debt was created by borrowing, and that what you received as money was not worth, at the time you got it, 60 cents in the dollar. You shall pay every dollar of this debt, not merely in dollars of 420 grains of standard silver, but in gold dollars of 25 8-10 grains of standard gold, which is more valuable by nearly 10 per cent. As matters stood yesterday, the problem of specie resumption appeared to be in the way of being solved without a shock, and henceforward all anxiety on that account might be dismissed. You might have embarked with new heart and hope in the various enterprises which engage capital and industry. You might have had all the advantage of the encouragement and confidence due to the successful accomplishment of an arduous task—to a return to a specie standard. All this is ended. You are still to be affrighted and deterred by the dim spectre of the consequences of a resumption in gold only. Resumption is not only deferred, but is made more difficult. More weight is put on you, and at the same time you are made weaker so that you will be the less able to bear it." All these consequences were directly decreed by the act of February 12 1873. I challenge contradiction.

Now, let it be imagined that any malevolent tyrant, exercising absolute power over the fortunes of his subjects, should have inflicted on them burdens like these. Would not the world have broken out in execration? Sure I am that no despot in any country where the people have anything to lose could have perpetrated such an outrage and have been so tamely submitted to. Yet we prate about our intelligence, our public spirit, our love of liberty, our resistance to oppression, and our popular sovereignty—which last phrase, if i

means anything, signifies that those who are entrusted with administration for the purpose of carrying on the government are accountable for their stewardship to the people who are their masters. I do not believe that such an atrocious outrage could have been accomplished fifty years ago without making it strictly necessary for every man who understandingly contributed to it to hide himself from the sober indignation of a pillaged people. I believe that at this day, while the reality of the outrage cannot be denied, not one man in a hundred is aware of the crime, or is indignant at the malefactors. This act of February 12, 1873,⁶ as we have seen, followed closely on the last legal-tender decision, and there can be no doubt that, so far as its unconstitutionality went, it was its lineal offspring. But every lawyer knows that the latest legal-tender decision was based on the opinion of Chief Justice Marshall in *McCulloch v. State of Maryland* (4 Wheat. 316), and Mr. Justice Bradley was right, logically, in deducing from that opinion conclusions in advance of those announced by his more cautious associates. There was something manly in his intrepid logic, and if the American people cared one fig for what our forefathers regarded as their most inestimable possession, it could hardly fail to take the alarm when thus distinctly admonished that the most authoritative legal tribunal in the land had proclaimed principles conferring upon the United States Congress the omnipotence so often claimed for the British Parliament, and reducing to the nothingness of a tinkling

⁶It will not do to say that this act of February 12, 1873, was passed hastily, and that it was a surprise upon the Democrats. It was discussed and substantially agreed on in the session of 1871-2. There was no debate over its provisions in 1872-3 that deserves the name, and (what I very much regret) the *Congressional Globe* does not show us the vote in either House on the final passage of the bill. It was under the especial patronage of Mr. Hooper, of Massachusetts, in the House of Representatives, and of Mr. Sherman in the Senate, but beyond this the records of that session disclose nothing of importance. The yeas and nays were not called on it once, and its far-reaching and pestilent consequences appear not to have been suspected. Mr. Casserly, of California, did, indeed, spend some time on an amendment on the subject of the devices of the several coins! He was solicitous to prevent the omission from some of them of the effigies of the eagle!

cymbal those constitutional limitations in which we had been accustomed to place our trust. It is notorious that the American people have given no proof that they scented the danger. Either they did not perceive the menace or they were careless and indifferent to the safety of what was threatened. If they were engrossingly occupied in the pursuit of higher things (if, indeed, higher aims than the care of civil liberty and the preservation of constitutional government *can* engage the attention of mankind), this apathy would be less disgraceful.

I have heard no answer to this characterization of the decision and the statute quoted. I have heard, indeed, a bold declaration that they are both in the highest degree constitutional in point of law and wise in point of statesmanship; but the favorite line of defence is to denounce all who are opposed to either as inflationists and repudiators.

Now, to whatever the *decision* led the way, its direct effect was to relieve the debtor, though it was made the occasion of a *statute* which well nigh crushed him by its injustice and unconstitutionality. I will not address any argument to those who can think the act of February 12, 1873, a *debitum justitiæ*, or a measure of statesmanlike wisdom. I am altogether engrossed with the question of the power of Congress, upon the presentation of any conceivable temptation, or the suggestion of any possible pretext, to perpetrate such a spoliation upon the people; and I have said that I am unable, if I accept the reasoning of Chief Justice Marshall, to deny the conclusions of Mr. Justice Bradley. Either the constitution is a rope of sand, or the reasoning of Chief Justice Marshall is unsound; and I cannot, as a lawyer, hesitate in my choice of the alternative. Of course, in saying this, I simply signify my adhesion to the many great jurists who, at the time and afterwards, proclaimed their dissent from the logic by which Chief Justice Marshall satisfied himself that Congress had power to charter a national bank. Mr. Justice Bradley has lately demonstrated that the same logic will suffice to clothe that body with whatever powers and prerogatives it may covet and declare to be necessary—itself being the sole and ultimate judge of the necessity.

The justices of the Supreme Court who, in 8 Wallace, declared the legal-tender act unconstitutional, and those who, in 12 Wallace, unavailingly protested against the reversal of that decision, expressed their confident belief that it would have been impossible that either Marshall or Story could have decided that Congress possessed the power to make engraved paper the equivalent of coined gold and silver. Such a conclusion was shocking to their sensibilities, and they deprecated and resisted it with eloquence and with pathos. They found, of course, many *dicta* of those eminent men which were wholly irreconcilable with the idea that a contrivance for borrowing money could, by any *fiat* known to the American jurist, be made money itself, and they demonstrated that both Marshall and Story must have revolted if suddenly asked to sanction the act of February 25, 1862. But they fail to show that the reasoning in 4 Wheat. 316 does not contain the "seminal principle of mischief;" and to my mind it is unquestionable that either this reasoning must be condemned as unsound, or we must accept the conclusion that there are no limits to the discretion of Congress—that all constitutional barriers are swept away, and that, with a very trifling modification of the terms, but none whatever of the spirit, we may adopt the maxim of the civil law, "*quod principi placuit legis habet vigorem.*"

It is true that no decision of the Supreme Court sanctions the act of 1873. That act was passed in time of profound peace, and no urgent demand, growing out of a crisis in our affairs, arose for its enactment. It would be very difficult to assign anything like *necessity*—something that knows no law and is incapable of restraint or guidance—for the donation to the bondholders and the spoliation of the people which was effected by that statute, and so that law stands condemned, upon all the rules up to this time declared by the court of last resort (except those indicated by Mr. Justice Bradley), as a usurpation of power. But we must not deceive ourselves. The reasoning employed by Chief Justice Marshall (in 4 Wheat. 316) is of extreme and most dangerous flexibility. There is no possibility for constitutional govern-

ment except in strict construction. What is called "*liberal construction*" is, in the worst sense of the term, *destructive*. It tears into shreds the charter the meaning of which is in question. It is the universal solvent. Bars of steel and walls of adamant melt like wax when it is applied. One is tempted, except that the matter is too grave for jesting, to quote the lines of the satirist on a kindred subject,

"A liberal conscience is all one,
And signifies the same as—*none*!"

when asked to tolerate the enlargement of a power given, or the arrogation of a power withheld, by invoking what is called a "*liberal construction*."

We may sympathize with the final minority of the Supreme Court of the United States in rejoicing that neither Marshall nor Story *did* ever sanction such a palpable violation of the letter and spirit of the constitution as the act of February 25, 1862, perpetrated; but, for one, I am glad that they never were tempted to do such a thing. No one honors the memory of Marshall more than I do. His ability, his mastery of legal principles, and his clear logic have always excited my admiration. One of the earliest and most cherished recollections of my boyhood is the sight of that great jurist presiding over the court to which he gave such lustre; and for stainlessness I have always ranked him with Washington. But both Washington and Marshall were only men; and it can hardly be doubted that the latter felt the ascendant of the genius of Hamilton. He accepted the opinion of that ablest man of the Federal party, that the Constitution permitted the creation of a bank, and on the bench he could only justify this opinion by reasoning which has since proved sufficient to warrant a more dangerous usurpation. Marshall might have hesitated to follow to its inexorable result the reasoning employed to defend the bank; but, besides that we have no assurance that he would have done this, we hope that he would in that case have pronounced the reasoning faulty from the beginning. It is not candid to adhere to a course of reasoning for certain purposes and to repudiate it for others. In a line directed towards a distant object, an

or in the aim, almost imperceptible in the beginning, will measured to an enormous divergence when a large portion space is traversed. But no geometrician would infer that a deviation was due only to the distance passed, or that the line was correct at any point of its course. He would know at the first step to be taken for avoiding error, and the ruin which waits on it, was to go back to the beginning and adjust the first *inch* of the direction. So here, when the premises of a syllogism lead us to an absurd conclusion, we know that a fallacy lies concealed in them, and proceed to exclude it. When a subtly-constructed argument conducts us first to an unexpected, then, by following it somewhat further, to a startling, and lastly to a monstrous, consequence, no man in his senses accepts the first and rejects the last. All are by the conclusion demonstrated to be founded on fallacies, detected or undetected, and the reasoning which led to that which perhaps flattered our prejudices stands condemned because we see that it conducts equally to that which overthrows all settled judgment. The fallacy must be eliminated from the argument before any trust can be placed in any of the deductions from it, whether immediate or remote.

In the meantime the following seem to be the measures of practical statesmanship which the conjuncture demands. First, the restoration, by the repeal of the act of 1873, of the dollar of 412 1-2 grains of standard silver to its capacity for paying a dollar of each debt contracted since 1837 and made payable *in coin*, by whomsoever to whomsoever. If before or since that day any contract has been made to pay *gold coin*, let that promise be fulfilled according to its tenor. In respect of the United States, let all bonds or promises to pay money by *it* issued since February 12, 1873, be redeemable in gold coin. Let the coinage of silver dollars of 412 1-2 grains, and of half and quarter-dollars of proportionate weight, be urged with all diligence at the national mints; and let all the outstanding legal-tender notes and fractional currency of the United States be paid out of the first money thus coined. When all these obligations are paid, *but not before*, let the bonds of the United States, issued before Feb-

ruary 12, 1873, be paid, as far as possible, in the same silver coin; and let no such bond be paid at any time in gold coin, unless, peradventure, gold coin should become, in the interests of the debtor, a medium preferable to silver in payment of debt (as was the case in 1853). Finally, in all future issues of bonds of the United States, let the medium of payment be declared in the bond; failing this, let the choice of the medium belong, as before, irrevocably to the debtor.

THOMAS T. GANTT.

II. CIVIL WAR AND LIFE INSURANCE.

One of the most intricate, and at the same time delicate, questions which the late civil war left as a legacy to the American courts was the question of the *status* of life insurance contracts, the parties to which had been separated by the hostile lines of the contending armies. It was an intricate question, because the peculiar features and the distinctive characteristics of the contract of life insurance were at that time so little understood. To the mass of people of ordinary intelligence the system of insurance on human lives presented itself as a bewildering labyrinth. By experienced officials, careful students of the system, and lawyers of considerable practice in life insurance controversies, the relations between insured and insurer, and their respective rights and equities, were seen rather than appreciated or comprehended. And that this was true, also, of practiced actuaries may be known from the one fact that Mr. Elizur Wright, a distinguished actuary, who was the author of the Massachusetts non-forfeiture statute of 1861, designing thereby to resurrect that long-buried equity of the policy-holder which has but lately been recognized by the courts in the decisions that we are presently to consider, has for several years been dissatisfied with that eminent work, and has acknowledged that it did not, after all, adjust with exactness the equities of the parties. The difficulties of the question were enhanced by the sudden and rapid development of the American system of life insurance. It was in blissful oblivion as to the possibility that a great civil war might convulse the nation and divide the people into two vast sections, that the buyers and sellers of life insurance had made of it a general interstate commerce. No such contingency had entered into their calculations, nor could it have been reasonably antici-

pated. The experience of the past furnished neither suggestions to the contracting parties nor precedents for courts; for no great and expanded system of life insurance operations, like ours, had ever before been rent asunder by the sword. So the large number of southern holders of policies issued by northern insurers found themselves, or at least believed themselves, possessed of legal rights as policy holders, the remedies for the protection of which were poorly defined, or defined not at all. For these reasons the questions thus presented to the courts were delicate as well as difficult.

These were questions, too, of casuistry, no less than of equity and law. This was the problem which would "catch the conscience" of the court. In our ordinary references to the equity tribunals as "courts of conscience," we do not think of the chancellor as a casuist. But such he always is when brought to face new and unsolved problems of equitable relations. It is after the infallible dictates of the hidden monitor have become rules *in foro conscientie* that they leave the domain of casuistry. If we would measure or fathom the conscience of any judge, let us see how he first dealt with this problem of civil war and life insurance.

And how will Anglican law be found to bear the strain upon it of this new force which demands adjustment and regulation? Has it any inherent power to provide for such cases? It has been said by many jurists that the principles of our common law, remaining themselves fixed, are "comprehensive enough to adapt themselves to new institutions, new modes of commerce, new usages and practices, as the progress of society and the advancement of civilization may require." Shall this still be said of our law, after it has grappled the new problem of life insurance as affected by civil war?

It seems curious, now, to look back upon the fluttering that prevailed among the courts as they met and undertook to solve this problem. Within the past year we have read and considered the decision of the Supreme Court of the United States in the *Statham* case. There we have been

duced to that almost forgotten feature of the life insurance contract which Mr. Elizur Wright calls "self-insurance." It is, perhaps, safe to say that the right of that feature of the contract to a hearing and to consideration by the courts is now generally admitted. There has been some criticism on the majority opinion rendered by Mr. Justice Bradley in the *Statham* case, for the manner in which it deals with that new equity and for the result thereby reached. But the fact that the element of "self-insurance," which inheres in every one of the ordinary contracts of life insurance, is accorded a hearing and recognized as an important factor in the problem, gives general satisfaction. The wonder now is, why did no court sooner discover this factor and employ it in its calculations? Why should all wait for Columbus first to poise the egg?

It would be scarcely profitable now to do more than glance at the various processes of reasoning indulged, and the diverse results reached, by the different courts who were called on to deal with this question. The first and most obvious answer of the insurer to a suit on one of these policies was that, by its own terms, it was null and void, or had become "forfeited" to the insurer, by reason of the failure to pay premiums. Most of the courts scouted the attempted application of this principle to these cases, apparently with indignation. But some wisely considered it the controlling feature of the cases, inasmuch as it had, long prior to the war, been recognized as such in all life insurance contracts. *Dillard v. Manhattan Life Insurance Company*, 44 Geo. 119 (1871), administered this principle alone in a brief opinion. In *O'Reilly v. Mutual Life Insurance Company*, 2 Bigelow's Cases, 97, the superior court of New York, in 1866, had done the same, holding that the intervention of the war, rendering performance of the contract to pay premiums impossible, amounted to a practical confiscation by the state of the right to keep the policy alive. *Worthington v. Charter Oak Life Insurance Company*, 41 Conn. 372, went elaborately over the same ground, not only applying the principle that "time is of the essence of the contract," as sufficient to control the

case, but holding also that the intervention of the war, preventing further performance by the insured, dissolved the executory part of the contract. In *Tait v. New York Life Insurance Company* (2 Ins. L. J. 861), in the United States circuit court, Emmons, J., went straight to the conclusion that, upon grounds of public law, the "substantial relations existing between the parties" were dissolved by the war because it would have been beneficial to the public enemy to keep them alive.

The very general refusal of other courts to coincide in any of these views, and their failure to furnish sound reasons for their different conclusions, serve to convince us now that they rather *felt* the presence of some equities in favor of the insured than *saw* or understood what those equities were. In no less than fourteen different cases it was decided by eight different courts that the war had only suspended, not abrogated, the contract of life insurance. It was held in *New York Life Insurance Company v. Clopton*, 7 Bush, 179 (1870); *Robinson v. International Life Society*, 42 N. Y. 54 (1870); *Manhattan Life Insurance Company v. Warwick*, 20 Gratt. 614 (1871); *Statham v. New York Life Insurance Company*, 45 Miss. 581 (1871); *Sands v. New York Life Insurance Company*, 59 Barb. 556, 50 N. Y. 626 (1872); and *Smith v. Charter Oak Life Insurance Company*, 1 C. L. J. 76 (Mo., 1873), that the intervention of the war did not revoke the authority of the former agent of the insurer to receive premiums, and that the tender or payment of premiums to such agent protected the assured from a default. In the *Robinson* and *Sands* cases in New York, and in *Martine v. International Life Insurance Company*, 62 Barb. 181, such payment in confederate money was held sufficient. In *New York Life Insurance Company v. Hendren*, 24 Gratt. (Va.) 536, it was broadly held that "the company was bound to keep an agent here continually, to receive premiums and to pay policies;" and the like ruling was made in 20 Gratt. 614, and 45 Miss. 581, *supra*, and by Blatchford, J., in *Hamilton v. Mutual Life Insurance Company*, 9 Blatch. 234. The doctrine of 20 Gratt. 614 was approved and followed in

tual Benefit Life Insurance Company v. Atwood, 24 Gratt. ; and in 45 Miss., 20 Gratt., and 9 Blatch. the decision rested partly on the theory that the insurer, a foreign corporation, by complying with the state laws as to transacting business in the state where the insurance was effected, had become domiciled in such state, so that all war questions were extraneous to the case. But it was further held, *contra*, in Cohen v. New York Mutual Life Insurance Company, 50 N. Y. 610; Hillyard v. Mutual Benefit Life Insurance Company, 6 Vroom, 415; *s. c.*, 37 N. J. 444; Martine v. International Life Insurance Company, 53 N. Y. 39; New York Life Insurance Company v. White (Va.), 2 South. Law Rev. (O. S.), 549; and Bird v. Penn Mutual Life Insurance Company, 5 Bigelow's Cases, 487 (U. S. Court, Penn.), that even tender of premiums was unnecessary, the effect of the war being to excuse wholly their non-payment. And in the Hamilton case, Blatchford, J., further advanced the ingenious theory that if the insurer had provided and kept an agent within the hostile lines, the insured "could have tendered the premium, and the agent could have refused to receive it, because he could not remit it, and because it would be confiscated." In the Bird case the judgment of Cadwalader, J., was based partly on the conclusion that "the war was not a cause of any forfeiture; none was incurred in addition to that incurred at law through the mere non-payment of the premium." But the court of appeals of New York argued, as to the war, that "there is no reason why it shall not save from forfeiture this condition of payment of the premium when due; it is the fault of neither party that it is not paid, and war suspends contracts like this, but does not destroy them." Sands case, 50 N. Y. 626. And the same court quieted itself, as to any possible injustice to the insurer, by saying: "No injustice is done to the defendant in this case by permitting the plaintiff to make, now, the payments she could not lawfully make between 1861 and 1865; the interest will compensate for the non-payment at the time; and the defendant, in legal contemplation, will be in precisely the situation it would have been had the money been paid

on the law day." Cohen case, 50 N. Y. 610. The court of appeals of Virginia thought it "a monstrous perversion of law" to allow the insurers "to hold on to the money they had received, and to say to their confiding victim: 'You now whistle to the winds for your merited reward, notwithstanding you relied upon our covenant and good faith to pay it' (Warwick case, 20 Gratt. 614); and congratulated itself on its decisions upon this subject, "so just, and so plainly enforcing the rights of destitute widows and orphans, have received the sanction, commendation, and approval of so many eminent courts, distinguished for their learning and wisdom. Indeed, it would seem that these courts generally thought with the Mississippi supreme court in the Statham case (4 Miss. 581), that the contract of life insurance was very much like a promissory note. That court seriously queried: "What essential features does this contract differ from an advance of money, made by a citizen of New York in 1851 on the bond of a citizen of this state, payable sixty days after the death of Dr. Statham, on the consideration of an annual payment of \$200?"

Throughout all these various opinions of learned courts there is manifest an almost total darkness of vision as to the features of the contract which controlled the later decision of the supreme court. True, the courts seemed at times almost ready to put their hands upon the true principle; they were "getting warm," as the children say in their games. Thus, the New Jersey court, in 6 Vroom, spoke of the "vested interest" of the insured, which was still "maturing," but failed, or at least declined, to discriminate it from "a debt growing due." The New York court of appeals, in the Cohen case, spoke of the gain of the insurers during the first years of the life of the policy, by the payment of premiums "in excess of the actual risk," and explained that "this excess is so much paid in advance for the greater risk during the later years of a long life;" but did not seem to consider that such excess was all that remained the absolute property of the insured, or that the insurer had earned the amount of the current premiums by carrying the "actual

" The same features of the contract were referred to in the *Bird* case by Cadwallader, J., who observed that, if the defendant was allowed wholly to prevail, the insured would lose the reserved rights thus acquired; but he treated these as giving to the insured only "an option to continue insurance on fulfilling the condition precedent," while at the same time the effect of the war was to convert the case into a forfeiture, relievable in equity, upon the principle of giving the insurer compensation in money by deductions from the policy. On the other hand, the same features of the contract were adverted to in the dissenting opinion in the *Warwick* case (20 Gratt. 614), as giving to the insured full compensation for all he had paid in premiums, in the carrying of the risk of his life by the insurer, thus relieving the latter from any further obligation under the contract. But in none of these cases was the "self-insurance" part of the policy looked to or recognized as of any importance in the determination of the case.

In the case of *Smith v. Charter Oak Life Insurance Company*, *supra*, relief was granted to the insured to only a modified extent. The refusal of the insurer to receive premiums after the outbreak of the war was treated as a breach of the contract, giving a right to damages; and the measure of such damages was held to be the value of the policy at the time of the breach. But how such value was to be ascertained is not disclosed by the report of the case in 1 C. L. J. 76. So, in *Hancock v. New York Life Insurance Company*, 4 Bigelow's Cases, 488, in the United States circuit court for Virginia, Bond, J., treated the withdrawal by the insurer of its agency as a breach of the contract, giving a right of action for damages, and instructed the jury to find the damages "the plaintiffs have suffered by reason of the defendant's breach of the contract;" and damages were given, accordingly, for a sum equal to a little over one-fourth of the policy. These cases show an attempt to administer a crude equity. Like the other cases above cited, they exhibit a sort of judicial "feeling after" the equities of the contract, rather than an appreciative understanding of them.

To the Supreme Court of the United States the pair most interested long ago turned for relief from the main doubt into which they were thus thrown. The two cases, *Hamilton*, from the circuit court of New York, and *Tait*, from the circuit court of Tennessee, taking, as we have seen, radically different views of the whole subject, were appealed to the Supreme Court. Unfortunately, when the cases were argued before that body, the vacancy in the office of chief justice left but eight judges on the bench, who were equally divided in opinion. Thus, when the judgments of the court were rendered on April 6, 1874, the two contrary decisions of the circuit courts were both affirmed, and the bewilderment was, if possible, greater than before.

In the *Statham* case (being the same case which arose 45 Miss. 581) and the two others decided with it at the October term, 1876, reported 93 U. S. 24, the view taken of this class of cases is a novel one. Except in cases arising under the Massachusetts non-forfeiture law of 1861, it is probable that the courts have never had presented to them the proposition that the holder of an ordinary life policy has always money in the hands of the insurer (at least during the earlier years of the policy) not consumed in insurance. Nor does it appear from Mr. Otto's report of these cases that the point was there presented, except in the concluding argument of Mr. Garfield for the insurers, and then, as we are informed, only in response to a suggestion of Mr. Justice Bradley from the bench. The opening argument for the insurers submitted the following analysis of the life insurance contract, which overlooked the feature of "self-insurance." "The contract consists of two parts, and is divisible. *First*, it effected an insurance upon the life of the applicant for one year, which is, so far as he is concerned, an executed contract. Should he die within that specific period the company absolutely covenants to pay the amount of the policy. *Second*, it purchased the option of his making the stipulated payments, and thus continuing the insurance from year to year, and is in this respect an executory contract." And the admission of counsel for the insurers, in the concluding

gment, went merely to the extent that, if any equitable adjustment of the controversy be made, it should be only on the basis of the *surrender value* of the policy.

The features of the contract which are made the basis of the opinion of the majority of the court may be stated as follows: Insurers of lives might, perhaps, have so prepared their policies that, as in fire insurance, each annual or other periodic payment of premium should exactly cover the risk assumed for the particular period. But, for reasons not necessary here to notice, they have not done so. Both in cases of "term payments" and "endowments," as also in cases where the periodic payments are spread over the whole period of life, these payments are arbitrarily averaged so as to be equal in amount. Inasmuch as the risk upon each life varies with the age of the subject, it follows that in no one year does the premium charged and paid measure or cover exactly the risk for that particular year. An average having been taken for the whole period of life, it results that in the earlier years of the policy, or prior to the middle life of the insured, the annual premiums exceed the cost of current insurance. The reason for this practice is, of course, immaterial in law, inasmuch as it has been adopted by the common consent of both parties to the contract, and is thus an inherent part of it. It also results that in the later years of the policy, or after the subject has arrived at middle age, the annual premiums will be less than the cost of current insurance, and that the insurer will be made whole in respect thereof by recourse upon the excess which has thus, in the earlier years of the policy, been collected in his hands. And so, as is stated by Mr. Justice Bradley, in his opinion, "*each instalment is, in fact, part consideration of the entire insurance for life.*"

Thus it will be seen that the premiums periodically paid upon the policy during the earlier years subserve, in part, three different purposes; and while the analysis of the contract into two parts, by the learned counsel in the *Statham* case, may have been quite correct, a different analysis must be made of the premiums. *First*, a part of each premium

serves to pay the insurer for the current insurance, or carrying of the risk during the period for which it is paid. *Second*, another part of each premium is absorbed in expenses of the company, or of the conduct of the business. *Third*, the remainder rests in the hands of the insurer, accumulating upon interest, ready to be drawn upon to pay in paying the cost of current insurance in the later years of the policy, or to respond to the demand for payment of the policy when it shall have matured and become a claim. The last-named sum, corresponding to deposits made by the insured in a bank, not for present needs, but to cover future contingencies, Mr. Elizur Wright calls the "savings bank branch of life insurance; while the power or ability of these savings to furnish insurance in later years is, in his technical phrase, the "self-insurance" of the policy.

As to the first item above named it is manifest that, by carrying the risk of the death of the insured for a year, and holding himself in readiness to comply with his contract to pay the policy, the insurer has earned the premium for such current insurance, and that premium has become his property. The second item of premium has been absorbed in necessary expenses, and is thus lost to both parties. It may be called "wear and tear." In case at any time the insured fails to pay further premiums, and abandons his contract, he releases thereby all claim to the third item, of savings or deposits. The clause of common occurrence in these policies, that in such cases all premiums paid "shall be forfeited" to the insurer, must evidently be understood to refer to this portion of the premiums, inasmuch as the first item has already become the property of the insurer, as we have seen. And in case of the death of the insured within any of the earlier years of the policy, it is plain that the "savings" part of the premiums have become legitimately the property of the company (for the benefit of its stockholders, if a stock concern, or for the benefit of its other policy-holders, if organized on the mutual plan), for the purpose of contributing to the fund necessary for the payment of the policy.

but while the contract is in full force in its earlier years, without any default or forfeiture, either present or ended, whose property is the "savings" or "deposit" portion of the premiums paid? It may possibly be a matter of doubt, *a priori*, whether in any case the policy-holder has any ownership or interest in these "savings." But the Massachusetts non-forfeiture statute rules, for that commonwealth, that they are the property of the policy-holder; and the very general practice of our American life insurance companies, in giving the "surrender value" of the policy to the retiring policy-holder, is an acknowledgment of the same ownership. The Supreme Court has passed on this question in the *Utah* case in terms so unequivocal as not to be misunderstood. After determining that the failure of the assured to pay the recurring premiums had the effect to terminate the contract, notwithstanding such failure was caused by the war, the court holds that neither party was to blame for such cessation, and that for this reason the policy-holder retains his ownership over the "savings." Mr. Justice Bradley says: "The question then arises, must the insured lose all the money which has been paid for premiums on their respective policies? If they must, they would sustain an equal injustice to that which the companies would sustain by reviving the policies. At the very first blush it seems manifest that justice requires that they should have some compensation or return for the money already paid, otherwise the companies would be the gainers from their loss; and that from a cause for which neither party is to blame." And after citing, as an illustration, the case of a supposed contract to buy a house, paying therefor in instalments, which should in like manner be terminated as a result of the war, he continues: "And so, in the present case, whilst the insurance company has a right to insist on the materiality of time in the condition of payment of premiums, and to hold the contract ended by reason of non-payment, they cannot, with any fairness, insist upon the condition as it regards the forfeiture of the premiums already paid. That would be clearly unjust and inequitable. The insured has an equitable right to have this amount

restored to him, subject to a deduction for the value of the assurance enjoyed by him whilst the policy was in existence." Again: "To forfeit this excess, which fairly belongs to the assured, and is fairly due from the company, and which the latter actually has in its coffers, and to do this for a cause beyond individual control, would be rank injustice. It would be taking away from the assured that which had already become substantially his property. It would be contrary to the maxim that no one should be made rich by making another poor."

The ownership by the policy-holder of the "savings" part of the premiums paid being thus conclusively established, the practical question recurs as to the relief to which he is entitled when the executory part of the contract has been terminated, without his fault, while yet the insurer denies his rights *in toto*. Here we must go beyond the opinion of Mr. Justice Bradley, and invite attention to another and very closely analogous case, recognizing the same right of ownership in the policy-holder, but enforcing it in a different way. The case of *Crawford v. The Ætna and Manhattan Life Insurance Companies*, decided by the Supreme Court of Tennessee at its April term, 1877, reported in 5 C. L. J. 100, rests upon facts similar to the *Statham* case. But the result there reached of an attempt to enforce the policy-holder's equity is essentially different. Mr. Justice Bradley concedes that the policy-holder is "fairly entitled to the equitable value of his policy," which is, in his view, as we have already seen, the excess of premiums paid over current insurance and expenses; but he allows him merely to recover this amount, with interest from the close of the war. This gives what is commonly known as the "surrender value" of the policy. But there is another mode, frequently employed, of settling with a retiring policy-holder, which is by the issuance of a paid-up policy for such amount as his "savings" will purchase. In the Tennessee case the opinion of Judge Turney, after finding that both parties to the contract intended to carry it out in good faith, but were prevented "by means not their own and entirely without their control," seeks to place the parties as nearly as possible

statu quo, and holds as follows: "We do not think the dependants are entitled to retain the full amounts of the premiums paid, but they are entitled to compensation for the risks during the years the policies were not suspended; and we can conceive of no better rule for the ascertainment as to hold, as we do, that complainant is entitled to *the due of paid-up policies* on the days that the premiums were not omitted to be paid, with interest."

The difference in the results of these two cases is broad and plain. One restores the funds in the hands of the insurer, with interest; the other converts them into insurance, in the form of a paid-up policy. All reputable insurers will at the present day give to their retiring policy-holders the equitable value of their policies, either in the form of the surrender value in cash, or in the form of such a paid-up policy as that cash will purchase. But after the death of the insured it is seemingly late to offer the surrender value.

In each of these instances there was, in fact, no surrender of the policy, nor any intention to make such surrender. The outbreak of the war found the policy in force, with the parties thereto desiring to keep it in force. It was a young policy, and "savings" had accumulated, the property of the assured. The war caused the cessation of the executory part of the contract, against the will of the parties, and these "savings," paid to the insurer as premiums for insurance, and "a part of the consideration of the entire insurance for life," in the language of the court, furnished good compensation for a paid-up policy. If there had been an agreement for a surrender, the assured could have claimed only these "savings" in kind. But there had been no such agreement; and when the close of the war permitted the assured to again claim the benefit of the policy, it was too late to ask him to "surrender," for the policy had already become a claim by the death of the insured. Shall the policy-holder be compelled to accept only the surrender value? Will not that be to impose on him the terms of a surrender, against his will, and by reason of circumstances for which he is in no wise responsible or blamable? Yet that is precisely what was done by the Supreme Court of the United States.



The fallacy of this conclusion, reasoning from the premise that the excess of premiums was the property of the assured who was in no fault and had not broken his contract, was apparent to Mr. Justice Strong, who said, in his dissenting opinion: "This is incomprehensible to me. I think it has never before been decided that the surrender value of a policy can be recovered by an assured, unless there has been an agreement between the parties for a surrender; and certainly it has not before been decided that a supervening state of war makes a contract between private parties, or raises any implication of one."

Mr. Justice Bradley and the majority of the learned Supreme Court were not as liberal as the Massachusetts non-forfeiture law of 1861 in their method of adjustment of the policy-holder's equity. That statute is as follows:

"Sec. 1. No policy of insurance on life, hereafter issued by any company chartered by the authority of this commonwealth, shall be forfeited or become void by the non-payment of premium thereon, any further than regards the right of the party insured therein to have it continued in force beyond a certain period, to be determined as follows, to-wit: the net value of the policy, when the premium becomes due and is not paid, shall be ascertained according to the 'combined experience' or 'actuaries' rate of mortality, with interest at four *per cent.* per annum. After deducting from such net value any indebtedness to the company, or notes held by the company against the insured, which notes, if given for premium, shall then be cancelled, four-fifths of what remains shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of premium, and the assumptions of mortality and interest aforesaid.

"Sec. 2. If the death of the party occur within the term of temporary insurance covered by the value of the policy, as determined in the previous section, and if no condition of the insurance other than the payment of premium shall have been violated by the insured, the company shall be bound to pay the amount of the policy, the same as if there had been

lapse of premium, anything in the policy to the contrary notwithstanding; *provided, however*, that notice of the claim and proof of the death shall be submitted to the company within ninety days after the decease; and *provided, also*, that the company shall have the right to deduct, from the amount insured in the policy, the amount at six per cent. per annum of the premiums that had been forborne at the time of the death."

It will be seen that this statute, even in case of a technical forfeiture of the policy for non-payment of premium, treats the excess of premiums paid as having already purchased paid-up insurance to a certain extent, which it gives to the policy-holder.

The opinion of the Tennessee court, though perhaps defective in its statements, and not furnishing all the reasoning by which the result is attained, has yet apparently reached the most logical conclusion from the premises assumed by both the learned courts. To test this, let it be understood and considered for what purpose and by what means the insurer came into possession of the moneys forming the excess of premiums, which it is now admitted were, and still are, the property of the assured. Mr. Justice Bradley treats these moneys precisely as deposits in a savings bank, refers to the standing regulation of some insurance companies to pay the equitable value of the policy whenever the assured wishes it, and says it is due on demand. He, therefore, requires the insurer, as a mere depositary or bailee, to return the money. But suppose the assured does not make any such demand? Suppose he did not ever agree or ask to have these moneys treated as a mere deposit? In fact, they were not so paid in the first instance. Like the moneys paid for current insurance, these moneys were paid for *insurance*; for a certain amount of insurance, not definitely ascertained, perhaps, but ascertainable, and payable at the death of the insured. Mr. Justice Bradley has himself furnished us the first clear and authoritative adjudication that these moneys form "part consideration of the entire insurance for life." It was insurance for which the parties contracted, and, so far

as these moneys will do it, that insurance has been actually paid for in full. Is it urged that this contract and payments were all alike dependent upon the continued payment of the annual premiums at the stated periods? Then the whole contract has lapsed for non-payment, and the premises are gone which give to the assured any right to this excess of premiums. Suppose, instead of an unintentional lapsing of the executory part of the contract, as the effect of the war, the same result had been obtained in some other way, as, for instance, by express agreement of the parties. Let it be agreed that the executory part of the contract shall be forever suspended, but the rights of the parties in all other respects shall remain unaffected. Inasmuch as that part of the contract by which this excess of premiums was paid is severed from the remainder, and stands, it is still a contract of life insurance—a contract for insurance, payable at the death of the insured—and it should be sustained and enforced as such a contract, and as nothing less. If not only the absolute ownership of the policy-holder over this fund, but also his absolute right to call the insurer to account therefor, be acknowledged, how can any court logically deny his right to call for that precise commodity which he contracted for and has paid for?

In an interesting article on this subject in 11 *American Law Review*, 221 (January, 1877), the conclusions reached by Mr. Justice Bradley are approved and sustained upon the theory that the excess of premiums in the hands of the insurer constituted, in law, a simple debt. It is there ably argued that, in a case of money paid upon an executory contract, or a contract of continuing performance, where performance afterwards becomes illegal, there is a failure of consideration, and thus the ownership of the money reverts to the payor, to whom the law gives the simple remedy of an action for money had and received. But *quære*, was there any failure of consideration in the class of cases now under review?

It may be thought by some that, though the policy should otherwise be held a valid contract for so much paid-up

insurance as the excess of premiums would buy, yet the war would still intervene, and the whole contract would thereby become abrogated. The theory advanced by the Judge Emmons, in the Tait case, *supra*, that the life insurance contract cannot be allowed to retain any vitality between belligerents or enemies, would unquestionably lead to that result. Such is the view taken in the article in the American Law Review, above mentioned. It is suggested that Mr. Justice Bradley may have been in error in adjudging that the equitable value of the policy could be computed as of the day of first default in payment of premium; it should be at "the instant of the breaking out of the war;" otherwise, there must have been a period from the outbreak of the war until the time of default in payment) "during which a valid contract of insurance subsisted upon the life of a public enemy;" and, if death had ensued during that period, the whole amount of the policy could have been recovered after the war, suggests the essayist. So, too, his premise that there was a failure of consideration as to the insurance covered by the excess of premiums paid, is based upon the proposition that the intervention of the war dissolved the contract.

But the Supreme Court did not so decide, as, indeed, the above-mentioned article admits. Not one of the judges rendered any opinion upon that question. Two dissenting judges held that the contracts were merely suspended by the war, and were revived when peace ensued. The others were all agreed that the contracts had lapsed, by their own terms, by the failure to pay the stipulated premiums. The opinion of Mr. Justice Bradley nowhere discusses the vital question whether at the outbreak of the war the contract was *eo instanti* dissolved. True, the questions of suspension and revival are referred to, but only *arguendo*, to show that, even if there had been a mere suspension of the contract, there could have been no revival; so that question is dismissed. But by failing to decide, when so fair an opportunity was presented, that the war itself dissolved the contract, and by holding the contract as remaining in force until the time of a default,

has not the learned court most practically decided that there was no dissolution or abrogation of the contract by intervention of war alone?

This conclusion may not have been the true one, and an essayist of the American Law Review may be correct; still it stands for the present as the decision of our highest court. It logically results that there was a time, after outbreak of the war and before any default in payment of premiums, when the contract was in force. From this it follows that the policy-holder had a certain vested right under the policy, which was not affected by his involuntary default in the payment of premiums. It is difficult to see in what aspect the war question can now be presented to the learned Supreme Court in which this decision will not be precedent. Even could a case now arise in which the death of the insured, immediately after the war had become flagrant and before any default, should be presented as a reason for asking the payment of the full policy, it would seem that the decision in the *Statham* case would furnish authority for the position that the war did not, *ipso facto*, dissolve the contract. But it is not the purpose of this article to discuss *a priori* these questions, which have been bandied about so extensively from bench to bench. The practical question now is what are the logical deductions from the recognition by the courts of the "self-insurance" equity of the policy-holder?

The Supreme Court of the United States has thus settled for itself the much-mooted question of the effect of the war on life insurance contracts by not touching it. The intricacies and meshes of discussion and contention over this vexed question had resulted in a worse than Gordian knot of controversy, which the acute perception of a single judge has served to sever at a single stroke. Mr. Justice Bradley is said to have been, in former days, an actuary. His practical treatment of the subject stands in sharp contrast to the tentative efforts of other judges to reach the merits of similar controversies. The skill with which he has led in exploring the mysteries of the life insurance contract, and has presented its "self-insurance" features as integral, tangible, and separ-

le, is admirable. It is probably not too much to say that the equity of the policy-holder will now be fully recognized in all the courts; at least until the ordinary contract of life insurance shall be, if ever, so remodelled as to expunge entirely its "self-insurance" features. But the manner in which that eminent judge has administered this long-forgotten equity is less satisfactory. When it is admitted that the excess of premiums which the assured pays are paid upon a consideration, that this consideration is insurance upon the life of the subject of the policy, that this is a distinct and separable portion of the contract, and that the rights of the policy-holder thereunder are not affected by his involuntary fault as to the executory part of the contract, we think, with the supreme court of Tennessee, that we are irresistibly led to the conclusion that the assured is entitled, at his option, to a paid-up policy. He may, if he chooses, sue at law for moneys had and received, and recover the surrender value. But if he brings a bill in equity for specific performance, he should be granted a paid-up policy; or if, pending the suit, the insured has died, he may, either upon a bill specifically brought, or on a prayer for general relief, have a decree, under the principles of specific performance, for the amount of a paid-up policy.

III. SOME NOTES ON DOMICIL.

Every person is subject to some particular system of law by which he is more or less exclusively bound. The necessity of this will be more obvious when we view man, *first*, as to his commercial relations; *second*, as to his taxes; and *third*, as to the succession to his estate on his death.

As to commercial relations, there are many cases, in this connection, in which it is important to determine the law with which an individual may be viewed as identified. A note is payable to me, for instance, but on its face no specific place of payment is designated. The presumption, in such case, is that the law by which the mode of payment is settled is the law in which I am myself enveloped. So, also, may it be inferred as to moratory interest flowing from me, when no other law is specified by which such interest may be governed. So, if I be an insurer, as to policies issued by me; or, if I be a banker, as to obligations issued by me. In default of other modes of discovering the law binding such cases, jurisprudence selects the law to which I am subjected myself.

So, in a still higher degree, is it with taxes. A man cannot, on any common principles of justice, be taxed for the same subject-matter by two independent sovereignties. He cannot, therefore, be taxed as to his income, or as to his person, or as to his estate, by more than one of the states of our American Union, although a contrary practice has, as to personal property, occasionally been resorted to. He cannot be taxed by *both* the United States and a foreign country; for, if he could, all the nations in the world, who could get hold either of him or of his property, could come down on him, and universal commercial ruin would ensue. In reference to taxes, therefore, even more fully than in reference

commercial obligation, each person must be viewed as subject to some one particular law, by which alone he is to be governed. This law, indeed, may involve a series of successively subordinate jurisdictions. Thus, subordinate to the federal government is the state, and subordinate to the state is the town; and these may, each in its sphere, tax the same person. But *two* governments of equal rank cannot *both* make the same person individually liable for personal taxes. Therefore, a man can be *personally* taxable only in *one* town in Massachusetts, or in *one* state in the American Union, or in *one* empire among the great powers of the world. And there must be some test, in cases of conflict, to determine to which claimant the taxes are to be paid. This test is supplied by domicil. Real estate and, according to the better opinion, personal assets are taxable by the law of the place where they are situated. But income taxes, poll taxes, and taxes on debts payable (without local security) to the creditor at his domicil, are settled by the *lex domicilii*.

So, still more strikingly, is it the case in the descent of estates. Few of us can be sure where we will die. Even those who have resisted, in youth, the dislodging power of enterprise, are apt, when their life is closing, to wander listlessly abroad in the restless languor of old age. New countries, in fact, are populated by emigration, and old countries renovated by emigration's reactions. Europe sends us its surplus populations to form our new families, whose object is to make money, and these new families, when they become old, go to Europe to spend the money so made. Domestic discomfort, also, has its share in producing these migratory propensities. Europe, it has been said, sends us our cooks, and our cooks send us to Europe. But, whatever may be the cause, the tendency to travel is almost universal; and those who do not travel to make money, travel to spend it. Hence it is that the place of a man's death is far from being universally the place of his home, or of his business. Such being the case, it is of much moment to us to determine whether the property we leave is to be sequestered by some foreign state—to pass through devious channels to objects

which we did not intend, or whether it is to be placed in the custody of laws with which we are familiar, and of guardians whom we may elect. There is nothing, in the chances and changes of life in which, as has been just seen, there is greater likelihood of a conflict of laws. And yet there is no subject as to which we must be more anxious to prevent while as yet we can, the occurrence of such a conflict. This can be done only by agreeing, internationally, upon a common arbiter, by which a just, a universal, a peaceful, and a pre-ascertainable result can be reached. And this arbiter is the *lex domicilii*.

We have thus noticed three personal relations as to which there is constant likelihood of conflict, and as to which, therefore, it is important to have some common test, internationally acknowledged, by which we can determine the applicatory law. These relations, to recapitulate, are, *first*, business in general, so far as concerns contracts with others; *second*, taxation; *third*, succession after death. What test, therefore, is there, of international acceptance, which we can adopt to determine collision on these topics? Let us glance, in turn, at the tests which have been at different times suggested, closing with that which alone has a philosophical basis, and which has secured international assent, showing, as we proceed, that domicile affords the only just arbiter.

First. Can Present Residence be such a Test?—If so, a man doing business temporarily in Boston, no matter how settled his permanent abode might be elsewhere, might be subject to Massachusetts law. Yet this would be only during his residence; and as soon as his residence shifts, the applicatory law shifts. Supposing, for instance, that he leaves Boston at noon, by the Shore Line, for New York. In this case, independently of the series of local municipalities through which he rushes, and which in rapid succession permeate him with their respective judicial atmospheres, he is, in turn, subjected to four sovereign jurisprudences: Massachusetts, Rhode Island, Connecticut, and New York. If he have a note payable, with no designation of the place of payment, then this note, as he moves—if mere residence be

test—changes its legal hue at each boundary, and comes, as to some of its incidents, substantially a new person three times in an afternoon. This, however, would be destructive to business as it is absurd. Then, again, the place we may happen to be in, at any particular time, is the result often of accident, determined sometimes by negligence, sometimes by providential dispensations which we cannot control; and it would be as unphilosophical as pernicious to make our most solemn engagements and dispositions of property depend on contingencies so arbitrary. Hence it is that by no civilized nation is mere residence regarded as the test by which the law, in cases of conflict, is to be determined.

If *residence* must be rejected, so must, *a fortiori*, nationality. Nationality cannot apply as between the sister states of the American Union, each of which has a separate jurisprudence, while the oath of allegiance is to the federal government alone. Again, the right of expatriation is now by treaty acknowledged by the great powers of Christendom; and expatriation implies a voluntary divesting of one nationality before the full obligations of a second have matured. Neither residence nor nationality, therefore, can be invoked to supply the missing test.

But the need has been met by the adoption, by the consent of jurists of all nations, of domicile, as supplying, so far as concerns personal *status*, the applicatory law. Domicile, in some cases, interprets a man's contracts; domicile always determines his personal taxes; domicile directs his succession. What, then, is domicile?

By the American courts it has been substantially defined *a particular place adopted by a person as his permanent residence, to be retained by him, as such, for an indefinite period of time*. It is not necessary, as will hereafter be seen, that this domicile should be one in which he is invested with political rights; nor need it be his corporeal residence at a given period of time, for he may leave it for years, and yet retain it as domicile, if he have the intention of returning; nor need he be even a citizen of the country in which domicile is

claimed, for he may have a domicile before he is naturalized. But it is essential that such domicile should be either impliedly or expressly adopted by him, and occupied as permanent residence, to be indefinitely retained by him. This definition has been accepted substantially by the whole civilized world.

Such being the definition of domicile, there are several questions connected with it which will now be examined, as follows :

First. Domicil by Birth.—By the Roman law, legitimate children have the same domicile as their father. It was open to them, however, subsequently to elect another domicile upon which the first ceased to exist. But until they were competent to execute such choice, and actually execute it, their domicile followed that of their father in whatever changes he might make, provided they remained members of his household. The modern law differs from the Roman in this respect, as follows: *Origo*, in the old Roman sense, is now obsolete. The modern idea of *origo* simply conveys the legal fiction that a child is domiciled, at his birth, in the place of his father's domicile. This form of *origo* (descent, Herkunft) fixes alike the jurisdiction that attaches to the child and the legal relations with which he is invested. To this state several modern civilians have applied the term *domicilium originis*, and although this expression involves an absurdity according to the Roman law, it rests upon a natural hypothesis in our own. It simply means: "This was a domicile acquired, not by choice, but by birth."

In England it has recently been held that there can be no change of domicile during infancy, and that the lapse of seven years after the attainment of majority cannot be regarded as affording a period sufficiently long to establish a change of domicile, in the face of any expressed intention to change.¹

In the United States legitimate children accept the domicile of their father. A foreign born child of a domiciled citi-

¹ *Jopp v. Wood*, 4 De G. J. & S. 616.

of the United States, however, has a double allegiance, and, on reaching maturity, he has the right to elect one allegiance and repudiate the other. And such election is final.²

Illegitimate children inherit, as a rule, the mother's domicile, irrespective of the place of birth.³ Under those codes, however, which give to the father the power of legitimating an illegitimate child by acknowledgment, the father's domicile, after such acknowledgment, followed by adoption, must prevail.

Second. Domicil and Nationality.—On this topic the following rules may be regarded as settled :

(a.) Domicil and nationality are not convertible terms. There may be domicile without nationality, and nationality without domicile. Thus, a German who emigrates with his family to this country, intending to make his permanent home on our soil, loses his German domicile and acquires an American as soon as he takes up his abode among us, though he may take no steps to become an American citizen, and, indeed, before he has had an opportunity to take such steps. So, on the other hand, an American citizen may acquire a domicile in Europe without abandoning his American nationality. This is peculiarly the case with merchants, who frequently, while retaining their national ties of allegiance, acquire a commercial domicile in foreign lands. So, also, in a still stronger sense, is it in relation to taxes. We do not hesitate, for instance, to tax, as domiciled among us, a French merchant who may, nevertheless, decline to view himself as an American citizen ; may resolutely cling to his French allegiance ; and may always express an intention of returning to France. Nor is it likely that our courts will hesitate to apply the same rule to the Chinese. They are a thrifty race, many of whom, in the course of time, may acquire large fortunes under the protection of our laws. At the same time they decline, as a class, to accept our nation-

² *Ludlaw v. Ludlaw*, 26 N. Y. (12 Smith) 356. See letter from Mr. Seward to Mr. —, Dip. Cor. 1868, pt. 11, 935. That an infant follows the domicile of surviving parent, see *Ryall v. Kennedy*, 40 N. Y. Sup. Ct. 347.

³ Whart. Conf. of Laws, § 37.

ality, and they adhere, with religious pertinacity, to the determination of returning, before death, to their native land. Are such men, living and growing rich under the shelter of our flag, to be relieved from taxation? Are they to be treated, as is the case with other undomiciled strangers, as still clothed with the legal *status* assigned to them by their native land, and entitled, when among us, to avail themselves of the privileges of that *status*? This is one of the undetermined questions of the future. But when it arises I cannot but believe that the decision will be that, although there may be domicile without nationality, so the obligation of domicile must be held to attach to the Chinese who take up their permanent abode on our shores, no matter how solemn may be their determination ultimately to return to their own land, or how severely they may maintain among us the distinctiveness of their Chinese nationality.

We must also remember that, when there is no other claim to nationality, that of domicile, or even of a long residence, may decide. It should be observed that there may even be nationality without naturalization. That naturalization is not essential to citizenship has been established in the United States by many precedents. When Texas was annexed, in 1845, its citizens became citizens of the United States by force of treaty; and such was the case with the treaty with Spain, annexing Florida, in 1819, and the treaty with France, annexing Louisiana, in 1803. The same rule applies to the late annexations of Savoy by France, and of Alsace by Germany.

In a number of our states foreigners are admitted as citizens before they are naturalized as citizens of the United States; and, so far as concerns the right to enjoy state privileges, this was held to be constitutional in the Dred Scott case. A country may decline to pass naturalization laws, yet in such countries we can readily conceive of emigrants acquiring nationality; and so as to *bona fide* settlers in the United States, in the period between their declaration of intention and their final naturalization.

For two reasons the old feudal idea of the perpetuity of

the nationality of birth, and, *a fortiori*, the perpetuity of the domicile of birth, must be now viewed as exploded. In the first place, a sovereign who permits his subject to emigrate relinquishes all claims of sovereignty over such subject. In the second place, recent treaties between the great civilized powers of Christendom recognize the right of expatriation, and renounce the claim of perpetual allegiance.

Third. How Domicil may be Changed.—A domicile once accepted is not to be viewed as divested by mere absence, no matter how long such absence may continue. Of this the most striking illustrations are those of merchants or factors in foreign ports; of officers in foreign service; of seafaring men; and of political refugees, whose return to their native land is temporarily barred.

"With regard to the domicile of birth," said Lord Cairns in a late case, "the personal *status* indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal *status* of another domicile is acquired." ⁴ The same rule may be applied, generally, to domicile by election or operation of law.

"The *animus* to abandon one domicile for another," said Lord Curriehill in a Scotch case, ⁵ "imports an intention, not only to relinquish those peculiar rights, privileges, and immunities which the law and constitution of the domicile confer—in the domestic relations, in purchases and sales, and other business transactions, in political or municipal *status*, and in the daily affairs of common life—but also the laws by which succession to property is regulated after death. The abandonment or change of a domicile is, therefore, a proceeding of a very serious nature, and an intention to make such a change requires to be proved by a very satisfactory evidence." Intent is essential to a change of domicile, and unconditional intent must be substantially proved. And it has been ruled by Vice-Chancellor Wigram that the evidence necessary to support the intention must be either

⁴ Bell v. Kennedy, Law Rep. 3 H. of L. 307.

⁵ Donaldson v. McClure, 20 D. 307; and see Jopp v. Wood, 4 De G. J. & S. 616.

express, or such as to show that, if the question had been formally submitted to the party whose domicile is in dispute, he would have declared his wish in favor of a change. Such an intention must be either shown to have actually existed in the mind of the party, or it must appear that it was reasonably certain it would have existed if the question had arisen in a form requiring a deliberate and solemn determination.⁶

When, however, an old domicile is definitely abandoned, and a new one selected and entered upon, "length of time is not important; one day will be sufficient, provided the *animus* exists."⁷ It is important to observe, especially in reference to emigrants to the United States, that, when the point of destination is not reached, domicile may shift *in itinere*, if the abandonment of the old domicile and the setting out for the new are plainly shown.⁸ A constructive residence may on this plan give domicile, though an actual residence may not have begun.⁹

Settlement, however, whether actual or constructive, is necessary to domicile.¹⁰ But it is enough to give the new domi-

⁶ Douglass v. Douglass, 41 L. J. Ch. 74.

⁷ See Moorhouse v. Lord, 10 H. of L. Cas. 272; Munro v. Munro, 7 C. & F. 842; Jopp v. Wood, 4 De G. J. & S. 616; Parsons v. Bangor, 61 Me. 457; Hamden v. Levant, 59 Me. 557; Ross v. Ross, 103 Mass. 575; First Nat. Bk. v. Balcom, 35 Conn. 351; Moreland v. Davidson, 71 Penn. St. 571; Reed's Appeal, 71 Penn. St. 378; Smith v. Dalton, 1 Cin. (O.) 150; Daniel v. Sullivan, 46 Ga. 277; Hawkins v. Arnold, 46 Ga. 659; Wood v. Fitzgerald, 3 Oregon, 268. Cragie v. Servin, 3 Curteis, 448. *Uno solo die constituitur domicilium si de voluntate appareat.*

⁸ Sir J. Leach, in Munroe v. Douglass, 5 Madd. 405; Forbes v. Fortes, Kay. 354.

⁹ Williams v. Roxbury, 12 Gray, 21. In Fayette v. Livermore, 62 Me. 229, it was held that a domicile of a woman cannot be changed by a mere intention to move, until actual removal. See, also, Carey's Appeal, 75 Penn. St. 201; Kellar v. Baird, 5 Heisk. 39. In Bangs v. Brewster, 111 Mass. 382, where a master mariner, in 1867, being domiciled in B., went to sea with his wife, intending to make his home at O., and sent her, in 1868, to O., where she boarded with her father, and in July, 1869, arrived at O. himself, it was held that in May, 1869, his domicile was in O.

¹⁰ Munro v. Munro, 7 C. & F. 877; Blumer *ex parte*, 27 Texas, 734; Hill v. Woodville, 38 Miss. 646; Hicks v. Skinner, 72 N. C. 1.

that the party should reside in it with the intention of remaining indefinitely. In such a case it is not necessary that there should be the purpose of technically permanent residence.¹¹

Much discussion has been had on the question whether, when an elective domicile has been abandoned, that which was original revives. Judge Story earnestly advocates such revival;¹² and to the same effect is the decision of a Scotch court¹³ and of the supreme court of Tennessee.¹⁴ Mr. Westlake explains and vindicates the old doctrine by saying,¹⁵ it 'is commonly, though somewhat improperly, cited by the phrase, 'native allegiance easily reverts,' and its chief application has been in the prize courts. The liability of private property to warlike capture at sea has always depended, not merely on the nationality, but also on the domicile of the owner; or it may be said that, for this purpose, domicile is the criterion of nationality. The motive, doubtless, lay in the assumption that the benefit of trade mainly accrues to that country from the ports of which it is carried on; whence only an actually subsisting residence for commercial objects could afford protection to the owner's property as against his nationality, for when such residence was discontinued, nothing remains to take the case out of the general principle which exposed enemy's property, as such, to capture. With these considerations were combined the respect paid to the place of birth by the feudal principle of allegiance, and the recognized rule of international law, that a state to which allegiance has been transferred has not the right to protect the citizen against his former government, if by his voluntary act he again places himself within its power.'

Yet it is important to remember that, whatever may be the reasons for the adoption of this doctrine of the revival

¹¹ *Sleeper v. Paige*, 15 Gray, 349; *Whitney v. Sherborn*, 12 Allen, 111; *Wilbraham v. Ludlow*, 99 Mass. 587; *Whart. Conf. of Laws*, §§ 20-24.

¹² *Story Conf. of Laws*, § 48.

¹³ *Colville v. Lander*, Morison, 14,963, App.; 5 Madd. 384.

¹⁴ *Kellar v. Baird*, 5 Heisk. 39.

¹⁵ *Int. Law*, Art. 40; See *Abdy's Kent*, 217.

of original domicil, when an elective domicil has been abandoned, it is inconsistent with the great body of the cases which place the adhesiveness of the elective domicil on the same basis as that of the original. Even by those holding to revival of domicil it has been repeatedly admitted that, when an elective domicil is actually acquired, it continues until a new domicil is definitely assumed. Sir John Leach, always rapid in arriving at a necessary conclusion, tells us that the same evidence is required to prove the resumption of the old domicil as the acquisition of one that is new;¹⁶ and, however this may be, we have an express decision of the Connecticut court of errors, that the abandonment of the elective domicil has no effect in reviving the original.¹⁷

Nor, in a question of this class, are we at liberty to keep out of view the test of policy. The consequences in the United States would be serious should the affirmative of this question be maintained. Emigrants come to us largely from countries subject to the modern Roman law, and make their domicil at their first port, often only to abandon it for another and then another, until they reach a home which affords them a convenient settlement. If we hold that on each abandonment they renew their original domicil, then their property and their persons would be frequently placed under the purview of a law utterly foreign to that which prevails in the country to which they emigrate. A German, for instance, abandoning a domicil in New York, in order to seek one, as yet undetermined, in the Northwest, would, as soon as he leaves New York, subject himself to the Roman law of marital community, thereby escaping the English common law of dower and curtesy; would sometimes, from being of full age, become a minor; would become sometimes incapable of any hypothecation of property without delivery

¹⁶ *Munroe v. Douglass*, 5 Madd. 403.

¹⁷ *First Nat. Bk. v. Balcom*, 35 Conn. 351. See, also, *Hicks v. Skinner*, 72 N. C. 1, where it is held that, when domicil of origin is abandoned, residence is the test. So, in *Reed's Appeal*, 71 Penn. St. 378, it is said that original domicil revives only when there is an intent to return home.

possession; would subject himself to his native municipal burdens; and would throw his estate into foreign channels of succession. Such consequences are not to be tolerated; and yet such consequences necessarily flow from the position at native domicile revives on every abandonment of acquired domicile. Our wisest course is to reject this doctrine, and to turn to that of the continuance of domicile in general, native or acquired, until a new domicile be secured.¹⁸

Fourth. How Change of Domicile is to be Proved.—I. Recitals.—It is a familiar principle that recitals of domicile in deed will are not conclusive, but may be rebutted by proof that the actual domicile was elsewhere.¹⁹ Recitals of domicile, in fact, are often inserted by a conveyancer according to his own notions, or according to what may suit a passing whim of the party. As a matter of every-day practice, also, persons having several residences are apt, in deeds relating to either, to have the local residence recited. The party's actual domicile, however, can be in only one of these residences, and may, perhaps, be in none of them. Nor is this all. Local law may prescribe certain recitals, as in the Marquis de Donneville's case, where Sir H. Jenner said: "I am not inclined to pay much attention to the descriptions of the deceased in the legal proceedings in France, for it may have been necessary, as the proceedings related to real property, that he should describe himself as of some place in that kingdom."²⁰ If it be argued that the French courts attach much weight to this species of evidence,²¹ the answer is that the recitals appealed to in the French cases are principally those which occur in notarial acts, dictated by the party himself, and often verified by his oath.

II. Declarations.—Declarations preparatory to naturalization, under the present English and American statutes, are

¹⁸ In *North Yarmouth v. Gardiner*, 58 Me. 207, it is held that domicile may be in abeyance.

¹⁹ See cases cited in Whart. on Ev. § 1097. *Gilman v. Gilman*, 52 Me. 55; *Somerville in re*, 4 Vesey, 750; *Attorney General v. Kent*, 1 Hurl. & Blt. 12; *Curling v. Thornton*, Addam's Rep. 19.

²⁰ Curteis' Ecc. Rep. 856.

²¹ See Phil. iv. 174, and cases there cited.

entitled to much weight as indicating intention. Even informal declarations of a person changing his residence when accompanied with actual change, are always admissible to show the intent.²² It has, however, been held that mere unexecuted intentions are inadmissible,²³ and even if this strong view be not taken, oral expressions indicative of an intention to change, if unaccompanied by actual removal, are so vague, and often so carelessly uttered, and so readily misunderstood, that they are entitled to very little credence. Unexecuted intentions, however, may be of importance when they consist of statements of a person in a foreign country that he is not settled permanently in such country but that he expects to return to the prior domicile which he regards as his home.²⁵

III. Exercise of Political Rights.—Civilian jurists unite with our own in holding it important, in this relation, to determine the site of political rights: "Dictæ expressæ declarationis domicilii constituendi equipollet illa, si quis in civitate aliquâ jus civitatis *das Bürgerrecht* impetraverit et ibi habitaverit vulgo *da einer verburgert oder Erbschuldigung geleistet* *hasslich und beständig gessesen ist*. Requiritur autem copulative ut quis ibidem non solum jus illud impetraverit, sed etiam actualiter habitet."²⁶ Menochius also writes, after quoting other civilians, "et idem ego ipse respondi, *in cons.* 390, etc. dixi civem hunc non sustinentem onera esse improprie civem et secundum quid;" and he adds the authority of other civilians, and the decisions in the *Rota Romana*, "qui scripserunt civem originarium aliquem non esse, nisi parentes ibi

²² *Brodie v. Brodie*, 2 Sw. & Tr. 90; *Ennis v. Smith*, 14 How. 400; *Thorn dike v. Boston*, 1 Metc. (Mass.) 242; *Kilburn v. Bennett*, 3 Metc. (Mass.) 199; *Burgess v. Clark*, 3 Ind. 250.

²³ *Bangor v. Brewer*, 47 Me. 97; see Whart. on Ev. § 1097; and see *Moke v. Fellman*, 17 Tex. 367.

²⁴ Whart. Conf. of Laws, § 63; Phil. iv. 156; *Lord Somerville's Case*, Vesey, 750; *Harvard College v. Gore*, 5 Pick. 370; *Anderson v. Lanenside*, 9 Moore P. C. 325; *Hallowell v. Saco*, 5 Greenl. 143; *The Venus*, Cranch. 253.

²⁵ See *Moorhouse v. Lord*, 10 H. of L. 272.

²⁶ *Tractatio de Domicilio* (1663), 27, cited by Phillimore, iv. 175.

milium contraxerint et civitatis numera subierint; ita et apud Romanos civis Romanos dicebatur is, qui etsi us esset Romæ altamen domicilium Romæ in ipsâ urbe traxisset ac qui tribum et bonorum potestatem adoptus et." ²⁷ Under the old European systems, also, when political privileges were rare, and mostly had a feudal relation, the acquisition or acceptance of such privileges was viewed as connecting their possessor with a special territory. The domicil of the serf was in the land to which he was attached; the domicil of the lord was in the land of which he was suzerain.

It was otherwise when political privileges became more common, and when they were annexed rather to the person than the soil. A man could have but one domicil, yet in England, in some parts of the Continent, and in Virginia, under the old system, he might vote at several polls. Suffrage now is regarded, under a wide and equal extension, as a personal right which may be exercised in any particular state of a general federation, only a few weeks' or months' special residence being required. In correspondence with this extension of suffrage, the presumption that the place of suffrage is the place of domicil has lost strength, and, where the right to vote is granted on brief and transient residence, the presumption arising from voting is easily rebutted by proof of actual domicil elsewhere. ²⁸

But the exercise of political franchise is not to be confounded with that deliberate surrender of one nationality and acceptance of another, which is marked by expatriation and naturalization. As the presumption of permanent

²⁷ Lib. VI., Presump. XXX., s. xxiv., p. 1037; Phil. *ut supra*.

²⁸ *Shelton v. Tifton*, 6 How. 163; *Easterly v. Goodwin*, 35 Conn. 279; *Kellogg v. Oshkosh*, 14 Wis. 623; *Mandeville v. Huston*, 15 La. Ann. 281; *Folger v. Staughter*, 19 La. Ann. 323; *Guier v. O'Daniel*, 1 Binney, 349, note. In *Van Valkenburgh v. Brown*, 43 Cal. 48, it was properly ruled that persons not citizens might legally be voters; this was the practice under the Northwest Ordinance, which permitted the voting of French and Canadian settlers, not citizens. See Dr. Spear's article in *Alb. L. J.*, 1876, 486. It is otherwise as to Indians with whom there is no treaty. *McKay v. Campbell*, 2 Sawyer, 118.

residence to be deduced from voting is but slight, that drawn from expatriation and naturalization is of the strong character, and amounts almost to conclusive proof. Before expatriation was legalized by the government of Great Britain (as it has been by the statute of May 12, 1870) naturalization in another country was viewed in the English courts as very strong proof of transfer of domicil.²⁹ Nevertheless, such expatriation and naturalization must be viewed as establishing a case of transfer of domicil which it would require extraordinary evidence of continuous inconsistency of domicil to overcome.

IV. Payment of Taxes.—No strong inference can be drawn from payment or non-payment of taxes, unless in the case of property or income taxes of considerable amount.³⁰ Yet here we must revert to the distinction already noticed. In a federal government, such as the United States, where an income tax is payable to the federal treasury, it may be a matter of indifference to a person taxed whether he pays it in Maine or in Georgia; and after he has changed his domicil from the one state to the other he may continue, through his agent or otherwise, to pay such tax in the abandoned state. We cannot make this inference as to a tax payable to a state treasury. If this tax is considerable, we cannot, as has been previously hinted, presume that the party charged would pay when no longer liable to do so. Payment of taxes, therefore, in such cases, affords a strong presumption that the party believed his domicil to be in the state in which the taxes were paid.

V. Duration of Stay.—In this relation we may accept two propositions: *First*, no matter how long residence may be, it does not constitute domicil unless there be an intention to remain for an indefinite period; and, *secondly*, that if there be such a *bona fide* intention, executed by actual removal, or attempted removal, domicil may be constituted by a stay of a single day.

²⁹ See Phil. iv. 176, 177; *Moore v. Darral*, 4 Hagg. 353.

³⁰ *Thomson v. Advocate General*, 12 Cl. & Fin. 1; see *Guier v. O'Daniel*, 1 Binney, 349, note.

How Far there may be a Double Domicil—A leading man authority tells us that a person may municipally have distinct domicils in places in which his residence is fully established, using each as a centre of his business

legal relations, and, when needed, actually dwelling in it.³¹ In the Roman law, so far as the abstract question of election was concerned, and so far as related to municipal courts and local jurisdiction, this position holds good. Another result, however, was reached when the issue was as to what jurisdiction should impress upon the individual his peculiar legal type. According to the Roman law, *domicilium* yielded precedence in this respect to *origo* (municipal citizenship, Bürgerrecht); and, when there were several of the latter class, the earliest prevailed.³²

That a man can have two domicils is thus emphatically denied by Chief Justice Shaw:³³ "The supposition that a man can have two domicils would lead to the absurdest consequences. If he had two domicils within the limits of sovereign states, in cases of war, what would be an act of imperative duty to one would make him a traitor to the other." But it is a serious objection to the able argument of which this is part that it not only blends domicil with allegiance, but overlooks the fact that domicil, in the view of those who hold that it may be cumulative, is capable of several degrees. It is admitted on all sides that a person can have but one testamentary domicil—i. e., a domicil determining the law of devolution of his property on his death. Yet, even by those courts by whom this position is most rigorously applied, it is maintained that domicil may be established, for the purposes of taxation or of divorce, on proof much less stringent than would be required to establish a testamentary domicil. Thus, of this distinction we have a conspicuous English illustration in a case where it was ruled that a person may retain a foreign domicil for many purposes, and yet be domiciled in England so as to give jurisdiction to the court of divorce.³⁴

³¹ Savigny, Rom. Recht. viii. § 354.

³² Savigny, viii. §§ 356, 357.

³³ Abington v. North Bridgewater, 23 Pick. 170.

³⁴ Yelverton v. Yelverton, 1 Sw. & Tr. 574.

Of American cases we have an abundance to show that the matrimonial domicile may exist on evidence clearly insufficient to establish a domicile for the purposes of succession. The prize rulings of Lord Stowell, also, whatever may be the present authority, instruct us that it has been held in England that a commercial domicile can be acquired in a foreign land when the original political domicile remains unchanged. So, also, we are told by the judicial committee of the privy council that there is "a wide difference in applying the law of domicile to contracts and to wills."³⁶ Sir R. Phillimore well says (Vol. iv. 48): "It might, perhaps, have been more correct to have limited the use of the term domicile to that which was the *principal domicile*, and to have designated simply as *residences* the other kinds of domicile; but a contrary practice has prevailed, and the neglect to distinguish between the different subjects to which the law of domicile is applicable, has been the chief source of the errors which have occasionally prevailed on this subject. This view coincides with that of Domat³⁷ and of Chancellor Kent,³⁸ who held that, while there "is a political, a civil, and a forensic domicile, a man can have but one domicile for the purpose of succession."³⁹

Political domicile is subject to distinct considerations. For many years the tendency of the English courts was, by implication, to hold that a man can have a plurality of domiciles of this class. "Acting on the principle of the indelibility of English allegiance, they maintained in theory that an Englishman and an Englishman's son must retain a political domicile till the tie was dissolved by death. Yet, practically, they were constrained, after the acknowledgment

³⁵ The Ann, Dodson's Adm. Rep. 223; Phil. iv. 51; Wheaton's Int. Law, 159.

³⁶ Croker v. Hertford (Marquis of), 4 Moore P. C. 339. See, also, Thorndike v. City of Boston, 1 Metc. 242; Greene v. Greene, 11 Pick. 410; Putnam v. Johnson, 10 Mass. 488; Somerville v. Somerville, 5 Ves. 750.

³⁷ L. i. t. xvi. § 6.

³⁸ Lect. 37, § 4, note.

³⁹ See, also, Maltass v. Maltass, 1 Robertson's Ecc. R. 75; Robertson on Personal Succession, 142; Thompson v. Advocate General, 12 Cl. & Fin.; 1 Whart. Conf. of Laws, § 74.

American independence and the treaties that sprang therefrom, to acknowledge that a political domicil could also be acquired in the United States. For a while there was an attempt to enforce the theoretic domicil of origin. Personal taxes were to be due from such emigrants; impressment was threatened, and, in some few cases, executed. After the war of 1812, however, impressment was abandoned. The same result was reached as to taxation, in 1845, when the House of Lords, overruling the Scotch court of exchequer, held that legacy duty was *not* payable by the legatees named in the will of a British subject who had died domiciled in a British colony, though the personal property was locally situate in Scotland, to which the statute extended.⁴⁰

The naturalization statute of 1870 settles this question definitely, so far as concerns English subjects naturalized in a foreign land. They are declared, by so doing, to have dissolved their relations to the mother country; and their single domicil, therefore, is in their adopted land. But the decision of the House of Lords, just noticed, goes beyond this. So far as concerns personal taxes, which is the main practical relation of political domicil, there is but one domicil. That domicil is the one the party has selected, and which, by residence without the purpose of return, he has acquired. There, and nowhere else, is he liable to be personally taxed. His alienage—*i. e.*, his non-naturalization—does not relieve him from such taxation in the country of his domicil;⁴¹ nor is it a bar to prosecutions for political offenses against the country of his residence.⁴² But such change of domicil, though unaccompanied by change of allegiance, relieves him, as has been seen, from personal taxation in his native land."⁴³

Sixth. Conflict as to Domicils.—Cases constantly arise where it is important to decide which of two domicils envel-

⁴⁰ *Thompson v. Advocate General*, 12 Cl. & Fin. 1.

⁴¹ *State v. Bordentown*, 3 Vroom (N. J.), 192.

⁴² Whart. Conf. of Laws, § 902.

⁴³ Whart. Conf. of Laws, § 74.

opes a particular person in its laws. In our own practice these questions come up most frequently in cases of taxation, when two or more states claim the same person as so domiciled as to be liable to taxation in each. A, for instance, has a colliery business in Nova Scotia, where he spends a month or two in the spring; a summer residence in Newport; a hunting-lodge in Maine, where he goes for recreation and diversion in the fall; and a winter home in Florida, where he tries to escape the cold. Is he domiciled in Nova Scotia, or Rhode Island, or Maine, or Florida, and by which is he personally taxable? And then, again, if he dies, by what jurisdiction is his estate to be distributed? By what code of law is his personal *status* to be determined? The answer, of course, is, by the law of his domicil. But then comes the question, what is his domicil? And in answering this question the following points are to be kept in mind:

(a.) Where there are two or more residences, that which the party selects as his domicil will be viewed, all other things being equal, as having the preference.⁴⁴

(b.) Supposing him, however, to have made no such selection, and supposing the conflict to be between two *homes*, one in the country and one in the town, then the inclination should be in favor of the home which the party seems himself to have regarded as his permanent abode. In England this is regarded generally to be the town house. But it is otherwise if either house be used only for temporary purposes, and it is in a condition only to be temporarily used.⁴⁵

We have this distinction thus expressed by Lord Hathorly, when vice-chancellor: "If a party select two residences, in one of which he can reside all the year, whilst in the other his health will not permit him to do so; and he must from the first be aware that, should his health fail him, his days must be passed where alone he can constantly

⁴⁴ The older cases will be found grouped in my work on the Conflict of Laws. Among the more recent cases may be noticed *Hampden v. Levard*, 59 Me. 557; *Moreland v. Davidson*, 71 Penn. St. 371; *Chariton v. Moberly*, 59 Mo. 238.

⁴⁵ Whart. Conf. of Laws, § 69.

side ; there is an additional reason for concluding that he regards such place from the first as that which must be his home—a conclusion greatly fortified by his chief establishment being fixed there.”⁴⁶ Such considerations weigh still more strongly in the United States, where the attachment to the country residence of the summer is, on patrimonial grounds, comparatively slight. But, even in this relation, express intent must control.

We must at the same time remember that when there are two residences, the claims of which are in this connection about equal, the earlier may be presumed to be that preferred as domicil.⁴⁷ But this fades away in the presence of evidence showing that the party, in selecting a second residence, selected it for permanent use. On this distinction, and on this alone, can we sustain a recent ruling of Vice-Chancellor Bacon,⁴⁸ where a Canadian came to Europe in order to educate his children, and, after living in Paris ten years, proceeded to England, where he remained, selecting it as a permanent residence, three years longer, that he was to be regarded as domiciled in England, though he sometimes spoke of intending to return to Canada.

In an English case tried in 1870, before Vice-Chancellor James, A., a domiciled Scotchman, married an Englishwoman, and then, on account of health, left Scotland, where his business relations were established, and resided for ten years in England. After this he returned to Scotland, and remained there for a few months, for business purposes, but was again compelled by ill health to go to England, where, for nearly two years, he was confined in an asylum. He then spent five years in travelling on the continent and in England. At the end of that time he settled at Brighton, and remained there, with his wife, for ten years till his death. His domicil was ruled to be in England.⁴⁹ Nor does the fact

⁴⁶ *Forbes v. Forbes*, Kay, 341.

⁴⁷ *Gilman v. Gilman*, 52 Me. 165.

⁴⁸ *Stevenson v. Masson*, 22 W. R. 150.

⁴⁹ *Aitchison v. Dixon*, Law Rep. 10 Eq. 589; s. c., 39 Law T. (N. S.) pt. 1, 705.

that a Scotch residence has been retained make any difference, if the conjugal residence and the permanent seat of the family is in England.⁵⁰ But even to this there is an exception, put with great weight by Sir W. P. Wood, vice-chancellor, afterwards Lord Chancellor Hatherly: "If some particular state of health required the wife to reside in a warm climate not agreeable to her husband, or the like, so that he was obliged to visit his wife away from home, he might still be domiciled at a residence of his own, apart from her, supposing he retains his family with himself."⁵¹

(c.) *Home, as a general thing, is to be preferred to place of business.* It is true that the English prize courts, in the wars with the first Napoleon, thought proper, in order to confiscate the property of neutral merchants trading in hostile countries, to reject this rule, and to hold that American traders sojourning in French ports were domiciled Frenchmen, though the parties so adjudicated upon disclaimed French citizenship, and had families in America whom they visited in places they regarded as their homes.⁵² But when England has lately found herself in the position of a neutral, her views on this point have undergone a change, and the indications are that Lord Stowell's rulings, as above noticed, will be no longer respected.

It is admitted, even by Lord Stowell, that in oriental or barbarous lands no mere mercantile residence confers a domicil. "Wherever," he said,⁵³ "a mere factory is founded in the eastern parts of the world, European persons, trading under the shelter and protection of their establishments, are conceived to take their national character from that association under which they live and carry on their commerce. It is a rule of the law of nations, applying particularly to those countries, and is different

⁵⁰ Forbes v. Forbes, Kay, 341.

⁵¹ Forbes v. Forbes, Kay, 341. See Exchange Bank v. Cooper, 40 Mo. 169.

⁵² The Indian Chief, 3 Robinson, 18; The Matchless, 1 Haggard, 103; The Rendsburg, 4 Robinson, 139; The President, 5 Robinson, 279; The Diana, 5 Robinson, 168. See The Venus, 8 Cranch, 279.

⁵³ The Indian Chief, 3 Robinson, 18.

from what prevails ordinarily in Europe and the western parts of the world, in which men take their present national character from the general character of the country in which they are resident; and this distinction arises from the nature and habits of the countries. In the western parts of the world, alien merchants mix in the society of the natives; access and intermixture are permitted, and they become incorporated to the full extent. But in the east, from the oldest times, an inmiscible character has been kept up; foreigners are not admitted into the general mass of the society of the nation; they continue strangers and sojourners, as all their fathers were. '*Doris amare enamore intermisceat undam.*' Not acquiring any national character under the general sovereignty of the country, and not trading under any recognized authority of their own original country, they have been held to derive their present character from that of the association or factory under whose protection they live."

These views have since been gradually extended to all cases of merely mercantile residence.⁵⁴

As between civilized states and, *a fortiori*, between coördinate states under the same federal government, as is the case with the United States, the home is, as a rule, to be treated judicially as domicil in preference to the place of business. In a case in which this rule was pushed to its extremest limit, the late Colonel James Fisk was held in New York to be domiciled in Boston, where his wife resided in a house bought by him for her in her own name, and where he occasionally visited, though his place of business had been for years notoriously and conspicuously in New York.⁵⁵ And however extreme this decision, under the particular circumstances, may appear, we must hold that where a man establishes his family there is his principal domicil.

Even as to unmarried persons, this rule applies in cases

⁵⁴ Advocate General (Bengal) v. Ranee Surnomoye Dossee, 9 Moore App. 387; 2 Moore, P. C. C. (N. S.) 22; and see Whart. Conf. of Laws, § 863.

⁵⁵ Fisk v. Chicago R. R., 53 Barb. 472. See, as a very strong case to this effect, Graham v. Trimmer, 6 Kans. 230.

where they have a family, though with that family their residence is only occasional. "If a man is unmarried," says Judge Story,⁵⁶ "that is generally deemed the place of his domicil where he transacts his business, exercises his profession, or assumes and exercises municipal duties or privileges." Yet, at the same time, "this," the learned author goes on to say, "is subject to some qualifications;" and he judicially held, in a case tried before him in the circuit court, that a young, unmarried man who had resided with his mother in Providence, but who, at the service of the writ, was engaged as a clerk in his brother's store in Connecticut, making frequent visits to his mother in Providence, was domiciled in Providence.⁵⁷

In *Mitchell v. United States*, 21 Wall. 350, Swayne, J., giving the opinion of the court, said: "The place where a person lives is taken to be his domicil until facts adduced establish the contrary. *Bruce v. Bruce*, 2 Bos. & Pull. 228, note; *Bampde v. Johnstone*, 3 Ves. 201; *Stanley v. Bernes*, 3 Hagg. Eccl. Rep. 374, 437; *Best on Presumptions*, 235. The proof of the domicil of the claimant in Louisville is sufficient. There is no controversy between the parties on that proposition. We need not, therefore, further consider the subject.

"A domicil once acquired is presumed to continue until it is shown to have been changed. *Somerville v. Somerville*, 5 Ves. 787; *Harvard College v. Gore*, 5 Pick. 370; *Wharton's Conf. of Laws*, § 55. Where a change of domicil is alleged, the burden of proving it rests upon the person making the allegation. *Crookenden v. Fuller*, 1 Sw. & Tr. 441; *Hodgson v. De Buchesne*, 12 Moore's P. C. 288 (1858). To constitute the new domicil two things are indispensable: first, residence in the new locality; and, second, the intention to remain there. The change cannot be made except *facto et animo*. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be

⁵⁶ Story, *Conf. of Laws*, § 47.

⁵⁷ *Catlin v. Gladding*, 4 Mason, C. C. 308.

the *animus* to change the prior domicil for another. Until the new one is acquired the old one remains. Whart. Conf., *supra*, and the authorities there cited. These principles are axiomatic in the law upon the subject. When the claimant left Louisville, it would have been illegal to take up his abode in the territory whither he was going. Such a purpose is not to be presumed. The presumption is the other way. To be established, it must be proved. 12 Moore's P. C., *supra*. Among the circumstances usually relied upon to establish the *animus manendi* are: declarations of the party; the exercise of political rights; the payment of personal taxes; a house of residence, and a place of business. Phillim. 100; Whart. § 62, and *post*. All these *indicia* are wanting in the case of the claimant."

So, in a late case in Massachusetts, the domicil of an unmarried police officer was held to be in N., where he kept his clothes and resided occasionally, as at a home, expressing himself as being an inhabitant of that town, though he worked and boarded in the town of W.⁵⁸

One important observation remains to be made as the summing up of the discussion which we are closing. It is impossible to get at the true idea of domicil unless we take into consideration the fact that it is man in his family relations whom it is the dominant policy of the state to preserve. Man as an individual may be well cared for by the state; but no matter what may be the care bestowed on him, he soon, if he is treated as a unit, passeth away as a flower, and is gone, and is no more seen. But man as a link in the chain of a family is continuous, and on the integrity and strength of the family depend the integrity and strength of the body politic. Hence it is that private international law envelopes a man in the jurisprudence to which his wife and children are subject. The jurisprudence in which he places them is that in which he himself is placed. Their home forms the anchorage to which he is judicially attached, no matter how widely and wildly he may wander. He may be absent for a series of

⁵⁸ Com. v. Kelleher, 115 Mass. 103.

years in a foreign land, yet by the law of his home is he governed, and not by the law of his foreign residence. He is taxed by his home law. His relations as to the three great decisive epochs of life—birth, marriage, and death—are determined by his home law.⁵⁹

His home, or rather the home of his family, determines the law regulating his personal *status*, though he may be born when his parents are far distant from that home. His home determines the legal duties and privileges of his marriage, though he may be married in a foreign land. His home gives the law by which his property is to be distributed on his death, no matter how remote from home may be the place in which he dies. It would seem as if the law of nations, in its tenderness for humanity, had summoned, as man's attendant in the most critical junctures of his life, the genius of home, and had given to that genius supreme judicial control. What the *lex domicilii*, or the law of home, decrees at these junctures, is the law that is final. The reason of this is obvious. It is the family that is to be preserved, for the sake both of the man himself and of the state. The man will be a vagrant, the state will be dissolved, unless the family be preserved; and this preservation of the family is the first duty of the law. And the application is obvious. The sanction which civilized nations have agreed to impose, we, as a nation peculiarly dependent on family purity and integrity for our well-doing, must hold sacred. In treating judicially of the law of domicile, we must in no case forget that, by reason as well as by authority, the law of domicile is the law of home.

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⁵⁹ Thus, persons who by the law of their domicile are precluded from contracting a marriage of particular class cannot, by removing from their domicile, contract such a marriage validly. So the converse is true; if their marriage is valid in their domicile, it will be there regarded as valid, though contracted abroad in a place where it is invalid. *Medway v. Needham*, 16 Mass. 157; *Stevenson v. Gray*, 17 B. Mon. 193; *State v. Kennedy*, Sup. Ct. N. C. 1877. See *Brook v. Brook*, discussed fully in *Whart. Conf. of Laws*, §§ 139, 141, 162, 183.

IV. A POINT OF THE STATUTE OF FRAUDS.

By the 4th section of the Statute of Frauds, 29 Car. 2, ch. 3, enacted in 1677, it is provided: "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." A point, and a genuine *vexata quæstio*, arising under this provision is, whether a parol promise to indemnify a person against liability incurred by becoming, at the request of the promisor, surety for a third person to a stranger, is within the statute. Text-writers agree that if the question were a new one it would, perhaps, present little difficulty. "If," says Mr. Throop, "the question was merely whether the general policy of the statute embraces such cases, probably few lawyers would hesitate to answer it in the affirmative." Throop on Parol Agreements, § 474. "Within the *mischief* of the statute," says Lord Denman, "it (a promise to indemnify) most certainly falls." *Green v. Creswell*, 10 Ad. & E. 453. In *Easter v. White*, 12 Ohio St. 219, a thoroughly argued case, one of the counsel being the Hon. Noah H. Swayne, at present an eminent justice of the Supreme Court of the United States, Sutliff, J., in delivering the unanimous opinion of the court, says: "Independent, therefore, of the contrariety of opinions upon the subject already referred to, I confess the question would, to my mind, seem quite free from doubt. * * * Whether we have respect to the language or the object, I think a reasonable effect can only be given to the statute by holding it to embrace every understanding, or promise to another, to be

answerable to him upon any contingency or condition for the debt or default due, or to become due, from a third person to such promisee, and thereby becoming surety for such third person to the promisee." Perhaps it might be put even stronger, and be said that if there was any one evil falling precisely within the letter and the policy of the statute of frauds, it would be the permitting a person, who has actually bound himself by obligation in writing, to throw the burden of the obligation upon another by parol. And yet, as we shall see, the authorities are as numerous on the one side of the question as on the other, and the weight of reasoning has been thought to be with the contrary doctrine. In a late American case the judge who delivers the opinion of the court does not hesitate to say that "the preponderance of authority" is that a promise to indemnify against such a liability is not within the statute. Per Coles, J., in *Vogel v. Melms*, 31 Wis. 311. And in the latest English case the learned judge pronounces the question "plain upon principle," so plain that he does not deign to state the principle or give a reason. Per Malins, V.-C., in *Wildes v. Dudlow*, 23 W. R. 435; *s. c.*, 3 C. L. J. 317. If the law be as thus announced, it is the growth of the last third of a century, a new shoot from an old stock, and presents a judicial phenomenon well worthy of the gravest consideration of the philosophic jurist.

For over a hundred years after its passage the statute was treated universally as meaning what its words fairly implied, and construed strictly with a view to the evils which it was intended to meet. Gradually, as society recovered from the demoralization of the civil wars of the seventeenth century, as manners ameliorated, and education spread to a larger class of the population, it was found that the statute sometimes resulted in the protection of fraud, instead of its prevention. Hard cases occurred, wherein the letter of the law was one way and natural justice another, and the ingenuity of able men and great judges became enlisted in finding a mode of reconciliation. It is the hard case which plays the mischief with the most fundamental principles and the most formidable line of precedents, and practically illustrates the

maxim that where there is a will there is a way. Given a strong sense of justice and consummate ability, qualities which, fortunately for the world, often adorn the bench, and somehow or other the principle is made to fit and the precedent glided by, and right prevails. The end of all law is attained in the particular case, though with some damage to law as a science and with some peril to subsequent suitors, by the nice refinements of the ruling. No branch of the law has suffered more from these causes than the one under consideration. There has been a continuous struggle for the last hundred years to find some ground for taking cases out of the statute which were clearly within it, in order to avoid the hardship of its application. Many of the vagaries or niceties thus brought about have been afterwards corrected. Some of them remain, however, and have resulted either in direct conflicts or in subtle refinements, "more than cool reason ever comprehends."

The first noted effort to take cases out of the statute, on account of the obvious hardship of extending it to such cases, is traced back to the language of Lord Hardwicke, in *Tomlinson v. Gill*, Amb. 330, decided in 1756. That eminent judge laid great stress upon the existence of "a new distinct consideration," and noted in passing, while agreeing in the conclusion of the majority of the court, that the distinction taken in the leading case of *Buckmire v. Darnell*, 6 Mod. 248, *s. c.*, 1 Salk. and 2 Lord Raym., "is a very slight and cob-web distinction." From the suggestion thus made of the effect of "a new distinct consideration" in taking a case out of the statute, a long line of decisions may be traced to the present day. The stream may be followed through *Williams v. Leper*, 3 Burr. 1886; *Leonard v. Vredenburg*, 8 Johns. 39; *Perley v. Spring*, 12 Mass. 297; *D'Wolf v. Rabaud*, 1 Pet. 476, and *Emerson v. Slater*, 22 How. 28; and the great names of Lord Mansfield, Chancellor (then Chief Justice) Kent, Mr. Justice Story, and Mr. Justice Clifford go to swell the current. It is true, the decisions themselves may in all these cases be based upon a sounder rule than can be deduced from the existence of a new consideration, but the reasoning

and the *dicta* lay stress upon the fact. "If," said Kent, C. J., in *Leonard v. Vredenburg*, "a promise to pay the debt of another be founded on a new and distinct consideration, independent of the debt, and one moving between the parties to the new promise, it is not a case within the statute. It is considered in the light of an original promise." "Whether by the true intent of the statute," says Mr. Justice Story, in *D'Wolf v. Rabaud*, "it was to extend to cases where the collateral promise (so called) was a part of the original agreement, and founded on the same consideration moving at the same time between the parties, or whether it was confined to cases where there was already a subsisting debt and demand, and the promise was merely founded upon a subsequent and distinct undertaking, might, if the point were entirely new, deserve very grave deliberation. * * If A agree to advance B a sum of money, for which B is to be answerable, but at the same time it is expressed upon the undertaking that C will do some act for the security of A, and enter into an agreement with A for that purpose, it would scarcely seem a case of a mere collateral undertaking, but rather, if one might use the phrase, a *trilateral contract*. The contract of B to repay the money is not coincident with, nor the same contract with, C to do the act. Each is an original promise, though the one may be deemed subsidiary or secondary to the other. The original consideration flows from A, not solely upon the promise of B or C, but upon the promise of both, *diverso intuitu*, and each being liable to A, not upon a joint, but a several, original undertaking. Each is a direct, original promise, founded upon the same consideration." The rule is thus broadly enunciated by Mr. Justice Clifford in the opinion delivered by him in *Emerson v. Slater*: "Whenever the main object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing the debtor's liabil-

ity." Text-writers have been unwilling to concede the existence of any such rule, and have succeeded, as they think, in ranging most of the cases upon which it is supposed to rest in some other category less exceptionable. Without qualification, it would undoubtedly go far to wipe out the statute. *Brown and Throop* both treat the doctrine as exploded. It is not the new consideration which takes the case out of the statute, but the fact that the promisor, or his property, is liable to pay the debt. *Maule v. Bucknell*, 50 Penn. 39; *Fullam v. Adams*, 37 Vt. 391.

The next noted effort to take cases out of the statute to avoid an apparent hardship was made by Lord Mansfield. In *Mawbrey v. Cunningham*, cited in *Cowp.* 227 and 2 Term Rep. 80, goods were delivered to a third person by the plaintiff, at the request of the defendant, who said he would see them paid for, and Lord Mansfield held that, as the promise was before the delivery of the goods, it was not within the statute, "because at the time of the promise there was no debt at all." In *Jones v. Cooper*, *Cowp.* 227, his lordship expressed his adherence to this ruling. But afterwards, in 1781, in *Peckham v. Faria*, 3 Dougl. 13, he conceded that he had been in error. And in *Matson v. Wharam*, 2 Term Rep. 80, the distinction made in *Mawbrey v. Cunningham* was treated as overruled, and since then all traces of it have disappeared. The American cases follow the later ruling. *Cahill v. Bigelow*, 18 Pick. 369; *Matthews v. Milton*, 4 Yer. 576.

The language of the statute is that "no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of *another person*, unless," etc. The words "another person" are comprehensive, and the statute might be construed to mean that a promise to answer for the debt, default, or miscarriage of any one except the promisor himself would be within the terms. Obviously, however, the debt, default, or miscarriage of another often forms the inducement or consideration of independent transactions where, in no just sense, can the new promise be said to be to answer for such debt.

default, or miscarriage. The leading case of *Eastwood v. Kenyon*, 11 Ad. & E. 438, in which Lord Denman considered himself as having made the discovery that the statute applies only to promises made to the person to whom another is answerable, will illustrate the distinction. There the guardian of an infant ward had advanced money for the maintenance of the ward during minority, which she and her husband, after their intermarriage, had promised to pay. As a mere incident to the transaction, the guardian, after he had advanced the money, to replace himself in funds for his own purposes, borrowed the amount from a third person, and gave his note therefor to the third person. Upon a suit by the guardian against the ward and her husband, to recover the money advanced, the fact that the guardian had afterwards borrowed the money from a third person was introduced in evidence, because the husband and wife, in part performance of their promise to repay the guardian, had paid one instalment of interest on the note. Upon this circumstance the defendants sought to rely upon the statute of frauds. Obviously, however, the borrowing of the money from a third person had no connection with the original advance by the guardian, and the promise of the defendants to reimburse him was independent of the loan. It was a promise to pay their own debt, and not the debt of another. It required no new discovery to show that the promise was not within the statute. And the discovery itself, namely, that the statute applies only to promises made to the person to whom another is answerable, when confined to similar cases, is the plainest dictate of common sense, and had long before been made by American judges. *Allaine v. Ouland*, 2 Johns. Cas. 52; *Conkey v. Hopkins*, 17 Johns. 113; *Mersereau v. Lewis*, 25 Wend. 243; *Colt v. Root*, 17 Mass. 229.

It follows necessarily, from the general principle enunciated in *Eastwood v. Kenyon*, that a promise to indemnify the promisee against a liability to be thereafter incurred by him, without the intervention of a third person who could be said to be primarily liable, would not be within the statute; for the promise would be to one to whom no other person is

answerable. It would equally follow as the dictate of common sense, the promise having no essential connection with any other debt, default, or miscarriage, although the latter might be the inducement or consideration of the independent transaction. Another step brings us to the class of cases under discussion, where the promise is to indemnify the promisee against a liability to be thereafter incurred by him, at the request of the promisor, but as security for the fulfilment of a third person's engagement to a fourth person. If, now, you can find a case falling within this last class, where no other person is answerable to the promisee except the promisor, then it would clearly take the promise out of the statute. Any case, on the other hand, where another person would be answerable to the promisee for the debt, default, or miscarriage, because it was his own debt, default, or miscarriage, as well as the promisor, would be within the statute even according to the doctrine of *Eastwood v. Kenyon*. The line, although a narrow one in appearance, is distinct and profound in reality. All the difficulties are narrowed to this issue, and, it seems to me, the conflict in the decisions has grown out of the laudable desire of the courts to avoid plain principles in order to attain justice in the particular cases.

Where one person becomes a surety for another, at the latter's request and for his benefit, the request necessarily implies a promise of indemnity; and if another person unites with the first in the request, and makes an express promise to indemnify the surety, his promise must necessarily be within the statute, as being collateral to the implied promise of the principal. Of course the case is still stronger if the principal has also made an express promise. Now, the simple question is whether the absence of a request by the principal to the surety, and the fact that the latter becomes surety solely upon the promise of the promisor, will take the promise out of the statute which would otherwise fall within it. Does the implied promise of indemnity by the principal, which results, by operation of the law, from the existence of

the relation of principal and surety, make the express promise of the promisor a collateral promise, and, therefore, within the statute? But the obligation of a principal to indemnify his surety, like the obligation of co-sureties as to each other, stands upon a principle of equity, and dates from the creation of the relation. *Bathurst v. De La Zouch*, 2 Dick. 460; *Boyd v. Brooks*, 34 Beav. 7. And, as was said by Sir Samuel Romilly in argument, and repeated by Lord Eldon in *Cragthorne v. Swinburne*, 14 Ves. 169, "after that principle of equity has been universally acknowledged, then persons, acting under circumstances to which it applies, may properly be said to act under the head of *contract implied from the universality of that principle*." It is the creation of the relation, no matter how brought about, which produces the relative rights of the parties as fixed by law. The implied liability of the principal to his surety is one of those presumptions of law which cannot be gone behind.

The first case which came before the English court involving this question, was *Thomas v. Cook*, 8 B. & C. 728, decided in 1828. The court of king's bench, in that case, sustained, as not being within the statute, a promise made by one of two persons, about to become sureties for a third, that he would indemnify his fellow surety against loss. The decision may be sustained upon a distinction mentioned in the next paragraph of this article, but was put by most of the judges upon the broad ground that a promise to indemnify does not fall within either the words or the policy of the statute of frauds. But, in 1839, the same court, in *Green v. Cresswell*, 10 Ad. & E. 453, expressly overruled *Thomas v. Cook*, the only substantial difference between the two cases being that in *Thomas v. Cook* the promise was made by one co-surety to another, whereas in *Green v. Cresswell* the promise was made by a person who was no party to the paper. In the last case Lord Denman said, with unanswerable point, that if a promise to indemnify was not within the statute, the statute could always be avoided by putting the promise in that form. "Even in that shape

he says, "we cannot see why it may not be within the words of the statute. Within the mischief of the statute it most certainly falls."

The case of *Thomas v. Cook* may, however, like the cases of *Harrison v. Sawtel*, 10 Johns. 243; *Blake v. Cole*, 22 Pick. 97; *Jones v. Letcher*, 13 B. Mon. 363; *Jones v. Shorter*, 1 Kelly, 294, and *Barry v. Ransom*, 12 N. Y. 462, be sustained upon another ground. These were all cases where the defendant, being already bound, as surety or otherwise, on a bond or other security, induces the plaintiff to go upon the instrument by a promise to indemnify him. But these decisions may be safely rested on the well-established doctrine that a surety may, by parol, limit the extent of his liability as between him and other parties to the paper. *Swain v. Wall*, 1 Rep. Ch. 80; *Craythorne v. Swinburne*, 14 Ves. 168; 1 Sto. Eq. Jur. sec. 477; *Deberry v. Adams*, 9 Yer. 52. The recent case of *Bessig v. Britton*, 59 Mo. 204, is, however, a direct adjudication that such a promise in such a case is within the statute.

The facts in the case of *Green v. Cresswell*, 10 Ad. & E. 453, were, that the plaintiff, at the request of the defendant, and upon the promise of the latter to indemnify him from liability, had become bound for a third person as bail in a civil suit. The decision was against the plaintiff, the court holding that the promise was clearly within the statute. In *Fitzgerald v. Dressler*, 7 C. B. 374, and *Batson v. King*, 4 H. & N. 739, doubts were thrown out as to the correctness of the ruling. And in *Cripps v. Hartnell*, 2 B. & S. 697; *s. c.*, on appeal, 4 B. & S. 414, the ruling was exactly the reverse upon a parol promise to indemnify bail in a criminal case, the court saying that, however it might be in civil bail, in criminal bail there was no debt or duty due from the principal to the surety to indemnify him. But the distinction thus made is more than questionable, and has never been taken in this country. Two of the American leading cases on this branch of the law, *Holmes v. Knights*, 10 N. H. 175, and *Kingsley v. Balcome*, 4 Barb. 131, arose

upon parol promises to indemnify bail in criminal proceedings, and the decisions are directly in conflict.

The earliest case in America, upon a promise to indemnify, is *Chapin v. Merrill*, 4 Wend. 657. The plaintiff in that case, at the request of the defendant, and upon his promise to indemnify him against loss, entered into a covenant with a mercantile firm that, if they would supply a third person with goods, he would guarantee payment. "This is clearly," says Marcy, J., "an original undertaking; it was not made with the party buying or selling the goods. The goods sold were not the consideration of the promise." The learned judge cites *Tomlinson v. Gill*, Amb. 330, and *Read v. Nash*, 1 Wils. 305, resting the decision manifestly on the independent, or "new distinct, consideration," upon which Lord Hardwicke laid so much stress in *Tomlinson v. Gill*. But *Chapin v. Merrill* was expressly overruled in *Kingsley v. Balcombe*, 4 Barb. 131, and *Baker v. Dillman*, 12 Abb. Pr. Rep. 313. The court of appeals has never passed upon the direct point, although Comstock, J., in his elaborate opinion in *Mallory v. Gillett*, 21 N. Y. 412, treats such a promise as not within the statute.

In *Chapin v. Lapham*, 20 Pick. 467, Shaw, C. J., expressed the opinion, *arguendo*, that a promise to indemnify a surety, who became such at the request of the promisor, would not be within the statute, although the third person upon whose bond he became surety "may have been himself liable incidentally, and upon a *promise implied by law*." This was the opening wedge, which was driven home by the same eminent judge in the subsequent case of *Aldrich v. Ames*, 9 Gray, 76, where the promise was held to be binding. There the case stated was, in substance, "that the plaintiff, at the request of the defendant, and for a valuable consideration, became bail for John A. Crehore, upon which the defendant promised the plaintiff to indemnify and save him harmless," and the defence was that the promise, not having been in writing, was within the statute of frauds. Shaw, C. J., said: "The court are of opinion that this ground is wholly unten-

able. This is a promise by the defendant to another to pay his debt ; or, in other words, to save him from the performance of an obligation which might result in a debt. But it is a promise to the debtor to pay his debt, and thereby to relieve him from the payment of it himself, which is not within the statute of frauds. The theory of the statute is this : that when a third party promises the creditor to pay him a debt due to him from a person named, the effect of such a promise is to become a surety, or guarantor only, and shall be manifested by written evidence. The promise in such case is to the creditor, not to the debtor. For instance, if A, a debtor, owes a debt to B, and C promises B, the creditor, to pay it, that is a promise to the creditor to pay the debt of A. But, in the same case, should C, on good consideration, promise A, the debtor, to pay the debt to B, and indemnify him from the payment, although one of the results is to pay the debt to B, yet it is not a promise to the creditor to pay the debt of another, but a promise to the debtor to pay his debt. This rule appears to us to be well settled as the true construction of the statute, well confirmed by authority." This opinion simply ignores the real issue—whether the promise is collateral.

In *Holmes v. Knights*, 10 N. H. 175, Parker, C. J., reaches the same conclusion, but by a different train of reasoning. There the case was submitted to the court upon a statement of facts, from which it appeared that one Webster was ordered to recognize, with two sureties, for his appearance in a criminal court to answer the charge of passing counterfeit money, and the plaintiff entered into such recognizance with Webster and one other person upon the defendant's oral application and promise to indemnify him ; that Webster did not appear, whereby the recognizance became forfeited, and the plaintiff had been compelled to pay, etc. After argument, the plaintiff had judgment. Parker, C. J., in delivering the opinion of the court, after laying down the general rule applicable to collateral undertakings, said that the questions to be examined were, whether Webster was liable to indemnify the plaintiff, and whether the defendant's

undertaking was collateral to that liability. He then proceeded: "When one requests another to become surety for him, and he does so upon that request, the law raises an implied promise to indemnify. But the case does not find that Webster requested the plaintiff to recognize for him, or that the plaintiff acted upon any such request. From the nature of the case, Webster must have assented that the plaintiff should become his surety; but mere assent, without any request or promise, and where there was a request by a third party, and an express promise by him to indemnify, is not sufficient to raise an implied promise. A declaration in favor of the plaintiff against Webster must have alleged that he became surety at his request, and on the request the promise to indemnify may be implied. But this case only finds that the defendant applied, and that he promised. If we may infer that Webster assented, we cannot infer any request by him. Of course we cannot find, nor could a jury, on such evidence, any credit given to Webster, or any original liability on his part, to which the defendant's engagement was collateral. For aught that appears to the contrary, if Webster made any request, the plaintiff refused. Webster, in that case, could not be held liable on the request he made, for that would not have been acted on, but rejected. The whole credit would have been given to the defendant. We do not mean to be understood, however, that the promise of the defendant would be within the statute had the case stated that Webster also requested the plaintiff to become surety for him. It is apparent that the plaintiff did not assume the liability upon the request of Webster, if one was made, but upon the request of the defendant, and upon his promise to indemnify; and there are authorities showing that a promise to indemnify in such case is not within the statute," citing and commenting on *Thomas v. Cook and Chapin v. Merrill*. "The promise of the defendant is not to answer for the default of Webster in not appearing, according to the terms of the recognizance. That was the undertaking of the plaintiff in the recognizance itself. Nor is it to answer for the default of Webster in not indemnifying the plaintiff.

It has no reference to any duty on the part of Webster to indemnify the plaintiff in case he should make default. That duty the defendant took upon himself." The learned chief justice concluded his opinion by saying that, under the circumstances, if Webster was also liable on an implied promise, that liability might be held to be an original independent liability. "If either was to be deemed collateral, the liability of Webster in such case would seem, in point of fact, to be collateral to that of the defendant."

This has been pronounced "the ablest argument, upon principle in support of the doctrine that the promise is not within the statute, which has been made in any case either in England or America." Throop on Par. Agr. § 460. But, with deference, the first part of the argument is based upon a literal construction of the statement of facts scarcely warranted by its terms, only resorted to in order to avoid the real difficulty, or as a makeweight to the weakness of the subsequent argument. The suggestion that the absence of a request by Webster, or even the refusal of such request in the first instance, would affect the plaintiff's right to proceed against him for a loss upon the promise which the law would imply from the circumstances, is clearly without foundation. And the intimation that, if either liability was to be deemed collateral, "the liability of the principal would seem in point of fact to be collateral to that of the defendant," is either a play upon words, or merely brings us back to "the trilateral contract" of Mr. Justice Story in *D'Wolf v. Rabaud*, which has been severely criticised.

In *Dunn v. West*, 5 B. Mon. 376, the supreme court of Kentucky arrived at the same conclusion reached by the courts of Massachusetts and New Hampshire, but by a different train of reasoning. There the defendant interposed, as a set-off, a demand against the plaintiff, arising out of his having been compelled to pay certain notes, which he had signed with the son of the plaintiff and for his benefit, at the request of the plaintiff, and upon the latter's promise "that he should not pay anything by it; that he, the plaintiff, would pay the debt himself if his son did not; and that if he

(West) had anything to pay on the notes, he would pay him back the same." The plaintiff having objected that the promise was within the statute, the jury found that the notes were executed upon the sole credit of the plaintiff. The court of appeals affirmed a judgment allowing the set-off, Marshall, J., remarking, in his opinion, that it was a doubtful question whether the defendant could recover at all from the son; but even if it was clear that he could recover, the action would necessarily be founded upon an *assumpsit* raised by a subsequent fact, to wit, the payment of the notes; which would not prove that there was any contract, express or implied, between them at the time when the notes were signed, much less that there was any debt for which the plaintiff became bound. He added, with reference to the conditional character of the promise, that the plaintiff did not promise to pay West if his son did not pay him, but to pay him if, in consequence of his son's failure to pay the original debt to another, West should have to pay that debt.

This is even more ingenious than the subtle distinctions of Chief Justice Parker. And it is submitted to the learned reader whether the hardness of the cases did not have much to do in bringing out the peculiar astuteness and ingenuity of both courts. Manifestly, the judges were looking to the apparent justice of the particular cases, and not to the real scope and object of the statute.

To sum up. The English authorities are hopelessly in conflict, and the American courts may be ranged in antagonism by states. To the cases from Kentucky, Massachusetts, and New Hampshire, cited above, may be added *Hassinger v. Holmes*, 5 S. & R. 9; *Jones v. Shorter*, 1 Kelly (Ga.) 294; *Beaman v. Russell*, 20 Vt. 205; *Mills v. Brown*, 10 Iowa, 314; *Vogel v. Melms*, 31 Wis. 306. On the other side, in addition to *Kingsley v. Balcombe*, 4 Barb. 131, we have *Draughan v. Bunting*, 9 Ire. 10; *Brush v. Carpenter*, 6 Ind. 78; *Easter v. White*, 12 Ohio, 219; *Brown v. Adams*, 1 Stew. 51; *Simpson v. Nance*, 1 Speers, 4; *Griffith v. Frederick City Bank*, 6 G. & J. 424; *Bessig v. Britton*, 59 Mo. 204. We have, it will be seen, eight states at one end of the scale to weigh against

eight at the other. Honors are easy in the way of direct authority.

Where the weight of authority is so evenly balanced, the scales of justice may be made to turn by the merit of the principles which underlie the decisions, or by considerations of public policy. The difficulty of finding a principle from which the conclusion can be logically deduced that a promise to indemnify is not within the statute, is evidenced by the fact that no two of the decisions to that effect assign the same reason. At the outset it was the existence of an independent consideration that swayed the master minds of Lord Hardwicke in *Tomlinson v. Gill*, of Chancellor Kent in *Leonard v. Vredenburg*, and of Mr. Justice Story in *D'Wolf v. Rabaud*. Chief Justice Shaw puts his decision upon the ground that the promise, to be within the statute, must be to the creditor, whereas the promise to indemnify is made to the debtor. Chief Justice Parker, with better logic, insists that the promise to indemnify is the main inducement to the risk, even if the principal obligor be also bound either expressly or by implication. While the supreme court of Kentucky rest their ruling on the assumption that the action in favor of the surety against the principal obligor would be founded upon an *assumpsit* raised by the payment of the debt, which would not prove that there was any contract, express or implied, between the principal and the surety when the obligation was entered into. In other cases the courts seem to be influenced rather by the inherent equity of the particular cases than by any connected chain of reasoning which will stand the test of logic. A line of decisions sustained by such diverse reasoning, and resting upon no universally recognized principle, cannot be pronounced to be a sure guide. It is easier, and just as satisfactory, to say, with Malins, V.-C., that the point is "plain upon principle," and give no reason at all. The decisions, it is obvious, rest upon nice refinements, and not upon substantial distinctions. On the other hand, we have the earnest lament of Lord Kenyon at an early day, and since echoed by several of his eminent successors on the bench, that the

courts had not from the first abided by the strict letter of the statute. *Chater v. Becket*, 7 Term Rep. 201. Lord Eldon concurred in this view. "I feel," he says, "all the disinclination which has been lately expressed, and strongly expressed, in many cases, to carry what may be called the struggles of courts of justice to take cases out of the reach of the statute further than they have been carried." *Cooth v. Jackson*, 6 Ves. 37. Warned by the utterances of the great English judges, the courts of Tennessee determined to follow the statute rigidly. Contrary to the current of authority, they held at an early day, and have adhered to the ruling, that part performance of a parol contract would not take it out of the statute. *Patton v. McClure*, M. & Y. 333. So, contrary to the very point on which the promise is by other courts taken out of the statute, they have decided that the promise must be in writing, whether made to the debtor or the creditor. *Campbell v. Findley*, 3 Humph. 330. When it is seen into what mazes the contrary course has led, the courts of this state may congratulate themselves on their wisdom.

It may be true, as intimated by an eminent American judge, that it is questionable whether this part of the statute has not promoted more fraud than it has prevented. Per Parker, C. J., in *Holmes v. Knights*, 10 N. H. 175. And, no doubt, the fact that the statute has been thus used has led the courts to depart from the letter of the law. But the remedy is in changing the statute by proper legislation, not in frittering it away by nice refinements, difficult even to apprehend. The abstruse readings and subtle distinctions of *Fearne on Contingent Remainders* must "pale their ineffectual fires" before those of the elaborate treatises on this very branch of the statute of frauds. It would seem to be safer to adhere to the letter than to attempt to follow the "erring spirit," often as impossible to materialize into a "questionable shape," even by the most skilful expert, as the spirit of our disembodied friends.

W. F. COOPER.

V. LAW AND INSANITY.

"That cannot be a fact in law which is not a fact in science; that cannot be health in law which is disease in fact."

It is an undisguised fact that the law concerning insanity, as defined and administered in criminal cases in almost all the courts of the United States and England, is not in harmony with the views and conclusions of scientific men throughout the civilized world who have made the study of insanity and the treatment of the insane a specialty. The subject is full of practical interest to the lawyer. If the law, in dealing with insanity in criminal cases, proceeds upon a false theory, such a fact should be clearly recognized. No good, but much evil, may be done by shutting our eyes to truth and nature. Scientific men, and a few courts, maintain that the so-called "tests" of insanity, as recognized and acted upon in criminal cases by almost all courts in this country and England, are no *tests* at all in any true sense of the term.

It is certain that the "tests" applied by the courts now, to determine whether a person is insane and irresponsible for alleged criminal acts, are very different from what they were in times past. And this difference has been brought about, not by legislation, but by the silent influence of knowledge and science. New light has shown the old theories to be wrong. But this did not take place at once. Error is never quick to acknowledge itself, for to it such acknowledgment is death. It never lets go any hold it has until it is compelled to do so; and for ages erroneous and barbarous notions of insanity prevailed, and were acted upon as true by the law. With the errors of the past we have nothing to do but to accept the warnings they give and the lessons they teach. With the errors of our own time, if any there

be, we have everything to do. We should recognize them, and get rid of them. The profession is not enamored with error. If it is a fact that the law proceeds upon a false theory in dealing with insanity, the time will come when it will be abandoned with the false theories of the past. And the sooner that time comes the better.

It is a principle of criminal law, and of morals as well, that there can be no crime without the intent to commit it. The real question in all cases is: Was there a criminal intent? If the party accused was mentally incapable of entertaining it, by reason of disease of the mind—insanity—then he is not responsible for his act. The doctrine as just stated is accepted by all courts, although it would seem to have been lost sight of in some instances where its recognition would have made clear what was otherwise confused. When insanity is pleaded as a defence for alleged criminal acts, the court does not leave the whole question to the jury as one of fact, as is done in all other cases, by charging the jury: "You have only to consider, first, whether the accused was laboring under a mental disease, and, secondly, such being admitted, whether the act in question was the offspring of that disease," but singles out particular facts, sometimes incident to the disease of insanity—as delusion, or a knowledge that the act was wrong at the time it was done—and gives them to the jury as "tests" by which they are alone to determine whether the accused is sane or insane, guilty or not guilty. It is concerning whether the "tests" so applied by the courts are true tests that we wish briefly to examine.

If we go no further back than the time of Sir Matthew Hale, who was a learned, great, just, and upright judge, we will find that the test he applied was as follows: "The best measure I can think of is this: such a person as laboring under melancholy distempers, hath yet ordinarily as great understanding as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony." As if, says Dr. Ray, the only difference between sanity and insanity were precisely that which is made by difference of age, and as if there could be two things more unlike than

the mind of a person "laboring under melancholy distempers" and that of a child fourteen years old. The workings of an insane mature mind and a sane immature one are radically different.

This same celebrated jurist recognized partial insanity as distinct from total insanity, but at the same time declared that partial insanity did not excuse a person from responsibility for his criminal acts. He said: "There is a partial insanity and a total insanity. The former is either in respect to things, *quoad hoc vel illud insanire*. Some persons that have a competent use of reason in respect to some subjects, are yet under a particular *dementia* in respect to some particular discourses, subjects, or applications; or else it is partial in respect of degrees; and this is the condition of very many, especially melancholy persons, who, for the most part, discover their defects in excessive fears and griefs, and yet are not wholly destitute of the use of reason; *and this partial insanity seems not to excuse them in the committing of any offence for its matter capital*; for, doubtless, that most persons that are felons of themselves and others are under a degree of partial insanity when they commit these offences. It is very difficult to define the invisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed by judge and jury, lest, on the one side, there be a kind of inhumanity towards the defects of human nature; or, on the other side, too great an indulgence given to great crimes." The only object in the exercise of care and caution, in the mind of this great judge, was to distinguish between perfect and partial insanity—not between sanity and insanity. The perfectly insane—that is, the wretched inmates of the mad-house, as they were in the age of Sir Matthew Hale, whom chains and stripes, cold and filth, had reduced to the stupidity of the idiot, or exasperated to the fury of a demon—were held irresponsible for crime. But it was thought no inhumanity towards the defects of human nature to punish, as a fully responsible agent, a person who was suffering from partial insanity, whatever influence the disease might have had upon his unlawful act. It is true

that this was at a time when insanity was looked upon as a supernatural visitation, divine or diabolical, but chiefly the latter. It was viewed as "a real possession of the individual by some extrinsic power. If the ravings of the person took a religious turn, and his life was a fanatical practice of some extraordinary penance—if, like St. Macarius, he slept for months together in a morass, exposing his naked body to the stings of venomous flies; or, like St. Simeon Stylites, he spent the greater part of his life on a pillar sixty feet high; or, like St. Anthony, the patriarch of monachism, he had never, in his extreme old age, been guilty of washing his feet—he was thought to have reached the ideal of human excellence, and was canonized as a saint; more often his state was deemed to be a possession by the devil or other evil spirit, or the degrading effect of a soul enslaved by sin; from one cause or other he was a just victim of divine displeasure, and had been cast down, in consequence, from his high human estate."

Being supposed to be possessed of the devil, the consequence was he was treated as if he were the devil. He was thrown in a dungeon, there chained, to lie in filth—his food being thrown to him through the dungeon bars—made a show of, and then beat and whipped for being the demon that such treatment made him. It is submitted that, with such views concerning insanity permeating all grades of society, it was not an opportune time to furnish "tests" and establish a jurisprudence concerning insanity that should apply to more civilized times. It is true, too, that this was at a time when it was generally believed there were peris, who lived on perfumes, and divs, who were poisoned by them; enchanted palaces; moving statues; veiled prophets, like Mokanna; brazen flying horses; charmed arrows; dervises who could project their souls into the body of a dead animal, giving it temporary life; enchanted rings to make the wearer invisible, or give him two different bodies at the same time; ghouls, who live in cemeteries, and at night eat the flesh of dead men; fairies that danced by moonlight—that tampered with children, imposing changelings on horror-stricken

mothers; wizards, from whom rain and wind could be purchased; and that fair weather might be obtained, and storms abated, by prayer; that whoever attained to wealth or eminence did so by a compact with Satan, signed with blood; **witches** who had intercourse with infernal fiends, and by their sorceries afflicted both man and beast. They were supposed to blight the marriage bed, destroy the births of women and the increase of cattle. They blasted the corn on the ground, the grapes in the vineyard, the fruits of the trees, and the grass and herbs of the field. They rode on broomsticks, sailed in sieves, and were accused of, and supposed to be constantly committing, all kinds of mischiefs. These beliefs, or many of them, were not merely the superstitions of the ignorant—they were received by the educated and the rulers as orthodox. And it is a sad historical fact that in England, a little more than two centuries ago, in 1664, Sir Matthew Hale, the most humane and enlightened man that history makes mention of, as then on the bench of England, not only believed in witchcraft, but took the opportunity, as judge, of declaring that the reality of witchcraft was unquestionable, "for, first, the scriptures had affirmed so much; and, secondly, the wisdom of all nations had provided laws against such persons, which is an argument of their confidence of such a crime." This declaration was made upon the trial of two unfortunate or insane old women, who were accused of witchcraft, in the county of Suffolk, England, where Sir Matthew Hale presided as judge. Sir Thomas Browne, who was a great physician as well as a great writer, was called as a witness in the trial, and swore "that he was clearly of the opinion that the persons were bewitched." The jury accordingly found a verdict of guilty. The judge, satisfied with it, condemned the prisoners to death, and they were executed. It was one of the last executions for witchcraft in England, for it occurred at a time—and this, says Maudsley, should never be forgotten—when the belief in witchcraft was condemned by the enlightened opinion of the country. As it was then with witchcraft, so it is now with insanity: the judge instructs the jury wrongly on matters of fact; they find accordingly a

verdict of guilty; he is satisfied with the verdict, and an insane person is executed. Many insane persons were in that age, without doubt, executed as witches, or as persons who had, through witchcraft, entered into a compact with Satan. It is a striking illustration of the condition of thought at that time, and of the great change which has taken place since, that such expressions as the black art, witchcraft, diabolical possession, and the like, have fallen entirely out of use, and would be thought to convey no meaning if they were used now. They were fictitious causes invented to account for facts, many of which undoubtedly lay within the domain of madness. Sir Matthew Hale was not accountable for the ignorance and superstition of his age; he was undoubtedly both a good man and a good judge, and yet, by reason of ignorance and superstition, did great wrong. This can be attributed to the age in which he lived, and not to any badness in him as a man. Nevertheless, ignorance and superstition are vices. Macaulay has somewhere said: "A vice sanctioned by public opinion is merely a vice. The evil terminates in itself. A vice condemned by general opinion produces a pernicious effect on the whole character. The former is a local malady; the latter, a constitutional taint. When the reputation of the offender is lost, he too often flings the remains of his virtue after it in despair. The Highland gentleman who, a century ago, lived by taking blackmail from his neighbors, committed the same crime for which Wild was accompanied to Tyburn by the huzzas of two hundred thousand people. But there can be no doubt that he was a less depraved man than Wild. The deed for which Mrs. Brownrigg was hanged sinks into nothing when compared with the conduct of the Roman who treated the public to a hundred pair of gladiators. Yet we should greatly wrong such a Roman if we supposed that his disposition was as cruel as that of Mrs. Brownrigg. In our country a woman forfeits her place in society by what, in a man, is too commonly considered as an honorable distinction, and, at most, as a venial error. The consequence is notorious. The moral principle of a woman is frequently more

impaired by a single lapse from virtue than that of a man by twenty years of intrigue. Classical antiquity would furnish us with instances stronger, if possible, than those to which we have referred." Hale did what, according to the light of his age, he believed to be right. What we contend for is, that the opinions of Sir Matthew Hale, delivered in an age of superstition and ignorance, so far as insanity is concerned, should have no weight in this age, where a commendable intelligence exists, among a certain class at least, concerning this disease of the mind. But we do know that, until quite recently, the course of practice in the English criminal courts, and in the courts of this country, has been in conformity to the principle laid down by Hale—that partial insanity is no excuse for the commission of illegal acts.

We now know that the superstitions above referred to, which occupied the minds of our forefathers, and from which not even the powerful and the learned were free, have totally passed away. And we have a right to demand that false notions concerning insanity, some of them imbibed in that age, shall also be relegated to the limbo of errors past. We know that the moonlight has no fairies; the solitude no genii; the darkness no ghost or goblin. There is no necromancer who can raise the dead from their graves; no one who has sold his soul to the devil, and signed the contract with his blood; no angry apparition to rebuke the crone who has disquieted him. "Divination, agromancy, pyromancy, hydromancy, chiromancy, augury, interpreting of dreams, oracles, sorcery, astrology, have all gone." There are no gorgons, hydras, chimeras; no incubus or succubus. No longer do captains buy of Lapland witches favorable winds; the apothecary no longer says prayers over the mortar in which he is pounding, to impart a divine afflatus to his drugs. Who is there now that pays fees to a relic or goes to a saint-shrine to be cured? These delusions have vanished with the night to which they appertained. In their support might be produced a greater mass of human testimony than probably could be brought to bear on any other matter of belief in the entire history of man. Let him,

therefore, who is disposed to balance the testimony of the past against the dictates of reason and science, whether that testimony pertain to insanity as understood in the past and upheld by the decisions of courts, or other matters, ponder this strange history.

In 1723, in the trial of Arnold for shooting at Lord Onslow, Mr. Justice Tracy observed, "that it is not every kind of frantic humor, or something unaccountable in a man's actions, that points him out to be such a madman as is exempted from punishment: it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, *no more than an infant, than a brute, or a wild beast*; such an one is never the object of punishment." This is Hale's doctrine, and the circumstances of the case show how faithfully the principles were applied. The case is reported in 16 Howell's State Trials, 764. Arnold was of weak understanding from his birth, and led an idle, irregular, and disordered life; sometimes unequivocally mad, and at all times considered exceedingly strange and different from other people. At school, when a boy, he was strange and sullen. By his friends and family he was regarded and treated as mad, though so little disposed to mischief that he was suffered to go at large. Contrary to the wishes of his friends he persisted in living alone in a house destitute of the ordinary conveniences. Sometimes he would lie about in barns and under hay-ricks; would curse and swear to himself for hours together; laugh, and throw things about the house without any cause whatever, and was much disturbed in his sleep by fancied noises. "Among other unfounded notions, he believed that Lord Onslow, who lived in his neighborhood, was the cause of all the disturbances, tumults, and wicked devices that happened in the country, and his thoughts were greatly occupied with his person. He was in the habit of declaring that Lord Onslow sent his imps and devils into his room at night to disturb his rest, and that he constantly plagued and bewitched him by getting into his belly or bosom, so that he could neither eat, drink, nor sleep for him. He talked much of being plagued by the Bollies

and Bolleroy's." He declared, in prison, it was better to die than to live so miserably, and manifested no compunction for what he had done. Under the influence of these delusions he shot at and wounded Lord Onslow. The proof of insanity was strong and clear. Arnold was undoubtedly insane, and what he did was the product of his disease. But, as a matter of course, under the charge of the court to the jury, they found him guilty. The court approved the finding, and sentenced him to be hung. The sentence would have been carried out had not Lord Onslow, who was fully convinced of Arnold's insanity, interceded in his behalf, and got the sentence commuted to imprisonment for life. In this case the *test* applied was that an insane person must not know what he is doing, "no more than an infant, than a brute, or a wild beast," in order to be held irresponsible for his criminal acts.

That the progress of science and general enlightenment had produced no improvement in the law on this subject is abundantly shown in the strong declarations of Sir Vicary Gibbs, when attorney general of England, on the trial of Bellingham, in 1812. "A man," he says, "may be deranged in his mind—his intellect may be insufficient for enabling him to conduct the ordinary affairs of life, such as disposing of his property, or judging of the claims which his respective relations may have upon him; and, if he be so, the administration of the country will take his affairs in their management and appoint to him trustees; but, at the same time, such a man is not discharged from his responsibility for his criminal acts." The attorney general in this case further declared, and Chief Justice Mansfield, who presided as judge at the trial, concurring, "upon the authority of the first sages in the country, and upon the authority of the established law in all times, which has never been questioned, that, though a man might be incapable of conducting his own affairs, he may still be answerable for his criminal acts, if he *possesses a mind capable of distinguishing right from wrong.*" It will be noticed here that a modification had now been made in the test of responsibility. In the place of the suf-

ferer, in order to be exempt from punishment, being totally deprived of understanding and memory, and to know no more what he is doing than a brute or a wild beast—in place, that is, of what might be called the “wild beast” form of the knowledge test—the power to distinguish right from wrong was insisted on as the test of responsibility. The law had changed considerably without even acknowledging it had changed. Let it be observed, however, that it was the power of distinguishing right from wrong—not in relation to the particular act, but generally—which was made the test of responsibility in this case. From this time on until 1843 the knowledge of right and wrong, considered as abstract qualities, was the test. It is true that, in this very case of Bellingham, Lord Mansfield, C. J., took the extraordinary liberty of changing the whole scope and meaning of the rule by telling the jury, in addition, that “it must be proved beyond all doubt that, at the time he committed the atrocious act, he did not consider that murder was a crime against the law of God and nature.” Two other celebrated cases, tried in the same year with Bellingham’s—Parker’s case and Bowler’s case—while going to establish the rule that knowledge of right and wrong, in the abstract, was the test by which to measure the responsibility of the accused, yet had some further tests attached to them clearly growing out of the facts of each particular case.

The case of Hadfield, who was tried in 1800 for shooting at George III. while sitting in his box at the theatre, and acquitted on the ground of insanity, seems to stand by itself. Mr. Erskine, who defended him, took the position that delusion, where there is no frenzy or raving madness, is the true character of insanity, and where it exists the accused is not responsible. Hadfield was acquitted, the acquittal not having taken place in consequence of the adoption of delusion, however, in place of the old criterion of responsibility, as it has sometimes been said, but having been rather a triumph of Erskine’s eloquence, and of common sense over legal dogma. But, while Hadfield undoubtedly labored under delusion, he had a knowledge of the consequences of

the act which he was about to commit. He knew that in firing at the king he was doing what was contrary to law, and that the punishment of death was attached to the crime of assassination; but the motive for the crime was that he might be put to death by others—he would not take his own life. It was clear he knew right from wrong; it was clear he knew the nature of the act he was about to do; it was clear he manifested design, foresight, and cunning in planning and executing it. Yet everybody saw he was insane, and that his insanity produced the act.

After the old "wild beast" form of the knowledge test had been quietly abandoned, most often a knowledge of right and wrong, without reference to the particular act, was plainly declared by the judge to be the simple and sufficient criterion of responsibility, and the jury was instructed accordingly; but this criterion was sometimes modified by the qualifications which judges introduced to meet their individual views, or to prevent the conviction of a person who was plainly insane and irresponsible. There was really no settled principle, no actual uniformity of practice, no certain result.

In 1843 McNaughten killed Mr. Drummond, the private secretary of Sir Robert Peel, under the insane delusion that Drummond was one of a number of persons who were following him about, blasting his character and making his life wretched. He transacted business a short time before the deed, talked and acted, for the most part, like any sane man, and the notion which led him to commit the act might not, in the nature of things, have been necessarily false, or such as no sane man could possibly entertain. So, in fact, the English public believed, and fierce was the storm of indignation which his acquittal on the ground of insanity excited. Thereupon the House of Lords, participating in the public alarm and indignation, propounded to the judges certain questions with regard to the law on the subject of insanity when it was alleged as a defence in criminal cases, the object being to obtain from them an authoritative exposition of the law for the future guidance of courts. The answers of the

judges to the questions thus put to them constitute the law as it has been applied since in England, and in most of the courts of this country, to the defence of insanity in criminal trials.

We will not insert here, at length, the questions of the House of Lords to the judges, and the answers thereto, but will quote from the able opinion of Ladd, J., in the case of *The State v. Jones*, 50 N. H. 385. Commenting on these questions and answers, he says: "It may safely be said that the character of the judges, and the circumstances under which the questions in *McNaughten's* case were propounded to them by the House of Lords, make it morally certain that if, in the nature of things, clear, categorical, and consistent answers were possible, such answers would have been given. In other words, that if a safe, practical, legal test exists, it would have been then found by those very learned men, and declared to the world. Such a result would have brought order out of chaos, and saved future generations of lawyers and judges a vast amount of trouble in trying this kind of cases. But an examination of the answers given shows that they failed utterly to do any such thing; and it is not too much to say that, if they did not make the path to be pursued absolutely more uncertain and more dark, they at least shed but little light upon its windings, and furnish no plain or safe clue to the labyrinth.

"In answer to the first question, all the judges, except Maule, say that, 'notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew, at the time of committing such crime, that he was acting contrary to law, by which is meant the law of the land.' Here is entirely a new element—knowledge that he was acting contrary to the law of the land; and hereupon the enquiry arises: Is a man, acting under a delusion of this sort, presumed to know the law of the land? The answer must be, Yes; for the judges say, further on: 'The law is

administered upon the principle that *every one* must be taken conclusively to know the law of the land without proof that he does know it.'

"Let this proposition be examined a moment. Knowledge that the act was contrary to the law of the land is here given as a test; that is, such knowledge is assumed to be the *measure* of mental capacity sufficient to entertain a criminal intent. By what possible means, it may be asked, can that test or measure be applied, without first finding out whether the prisoner in fact knew what the law of the land was? How could a jury say whether a man knew, or did not know, that an act was contrary to the law of the land, without first ascertaining whether he knew what the law was?

"It is like saying that knowledge of some fact in science—as, for example, that a certain quantity of arsenic taken into the stomach will produce death—shall be the test, and at the same time saying it makes no difference whether the prisoner ever heard of arsenic or knows anything of its properties or not. Knowledge that the act is contrary to law might be taken as a measure of capacity to commit crime, and so might knowledge of any other specific thing that should be settled upon for that purpose, and such a test would be considered as comprehensible, whether it were right or not; but when it is said that knowledge of a certain thing is the test, and then we are told in the next paragraph that it makes no difference whether the man ever heard of the thing or not, I confess that I am not able to see any opening for escape out of the maze into which we are led. Whether a jury would be more successful would depend, I suppose, on their comparative intelligence.

"In answer to the second and third questions, which relate to the terms in which the matter should be left to the jury, the judges say that, 'to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, he did not know he was doing what was wrong.'

“Suppose, now, an insane man does an act which he knows to be contrary to law, because from an insane delusion (if that term amounts to anything more than the single term insanity) he believes it to be right, notwithstanding the law; that the law is wrong, or that the peculiar circumstances of the case make it right for him to disregard it in this instance, how are these two rules to be reconciled? It would seem to be plain that they are in hopeless conflict, and cannot both stand.

“The answer to the fourth question introduces a doctrine which seems to me very remarkable, to say the least. The question was: ‘If a person under insane delusion as to existing facts commits an offence, is he thereby excused?’ To which the answer is as follows: ‘On the assumption that he labors under partial delusion only, and is not in other respects insane, he must be considered in the same situation, as to responsibility, as if the facts, with respect to which the delusion exists, were real. For example: If, under the influence of delusion, he supposes another man to be in the act of attempting to take his life, and he kills the man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury upon his character or fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.’

“The doctrine thus promulgated as the law found its way into the text-books, and has doubtless been largely received as the enunciation of a sound legal principle since that day. Yet, it is probable that no ingenuous student of the law ever read it for the first time without being shocked at its exquisite inhumanity. It practically holds a man, confessed to be insane, accountable for the exercise of the same reason, judgment, and controlling mental power as is required of a man in perfect mental health. It is, in effect, saying to the jury: ‘The prisoner was mad when he committed the act, but he did not use sufficient reason in his madness. He killed a man because, under an insane delusion, he falsely believed the man had done him a great wrong, which was giving rein

to a motive of revenge, and the act was murder. If he had killed a man only because, under an insane delusion, he falsely believed the man would kill him if he did not do so, that would have been giving rein to an instinct of self-preservation, and would not have been crime.' It is true, in words the judges attempt to guard against a consequence so shocking as that a man may be punished for an act which is purely the offspring and product of insanity, by introducing the qualifying phrase, 'and not in other respects insane.' That is, if insanity produces the false belief which is the prime cause of the act, but goes no further, then the accused is to be judged according to the character and motives which are presumed to spring out of that part of the mind which has not been reached or affected by the delusion of disease. This is very refined. It may be that disease sometimes takes a shape to meet the provisions of this ingenious formula; or, if no such case has ever yet existed, it is doubtless within the scope of omnipotent power hereafter to strike with disease some human mind in such peculiar manner that the conditions will be fulfilled; and when that is done, when it is certainly known that such a case has arisen, the rule may be applied without punishing a man for disease. That is, when we can certainly know that, although the false belief on which the prisoner acted was the product of mental disease, still, that the mind was in no other way impaired or affected, and that the *motive* to the act did certainly take its rise in some portion of the mind that was yet in perfect health, the rule may be applied without any apparent wrong. But it is a rule that can be safely applied in practice that we are seeking; and to say that an act which grows wholly out of an insane belief that some great wrong has been inflicted is at the same time produced by a spirit of revenge, springing from some portion or corner of the mind that has not been reached by the disease, is laying down a pathological and psychological fact which no human intelligence can know to be true, and which, if it were true, would not be *law*, but pure matter of fact. No such distinction ever can or ever will be drawn in practice, and the absurdity as well as the inhumanity

of the rule seems to me sufficiently apparent without further comment.

“To form a correct estimate of the value of these answers, we have only to suppose that, at the end of a criminal trial where the defence is insanity, they be read to the jury for their guidance in determining the question with which they are charged. Tried by this practical test, it seems to me they utterly fail; and the reason for the failure, as I think, is that it was an attempt to lay down as law that which, from its very nature, is essentially matter of fact. It is a question of fact whether any universal test exists, and it is also a question of fact what that test is, if any there be.”

This lengthy quotation has been made because it covers the celebrated answers of the English judges, and shows them to be inconsistent, unsafe as guides in practice, wrong in themselves, and, if logically applied, inhuman in their results; and also because it has become too much the custom to evade the unanswerable arguments brought against the rules embodied in these answers by saying they are the abstract conclusions of doctors and scientific men, and not the results of the experience of judges and lawyers who have to administer the law in these difficult cases. Here is a learned and able judge who, when called upon to apply the English rules, refuses to do so. He gives unanswerable reasons for such refusal. We will soon see that Judge Ladd does not stand alone among judges in refusing to apply the tests furnished by the English judges in 1843. The failure of the English judges makes it morally certain that no safe, practical legal test exists by which to determine whether a man is insane. Whether a person is so or not is clearly a matter of *fact*, and not a question of law. The *law* by which the courts and juries are to be guided, when insanity is pleaded as a defence, is that no man shall be held accountable, criminally, for an act which was the offspring and product of mental disease.

It will be observed that the answers of the English judges to the House of Lords had the effect of doing away with the test of a knowledge of right and wrong in the abstract; that

test was allowed to go the way of the wild beast form of the knowledge test. In the answer to the first question, the test of responsibility in the accused was made to depend upon whether he knew his act was contrary to the law of the land at the time of committing it. The answers to the second and third questions made a knowledge of right and wrong, with reference to the particular act at the time of committing it, the test. Since those answers were given by the English judges, the law relative to insanity in criminal trials has been laid down in conformity with their conclusions.

In this country, having inherited the common law of England, our courts have followed, in the main, the English decisions on the subject of insanity, as will be readily seen by examining the cases referred to in any leading text-book treating of the subject of insanity. These cases are numerous, and cannot be referred to in detail here. The rule usually laid down for the guidance of juries being that if the prisoner, at the time of committing the alleged criminal act, knew the nature and quality of it, and that in doing it he was doing wrong, he must be held responsible, notwithstanding that on some subjects he may have been insane; that in order to exempt a person from punishment, insanity must be so great in extent or degree as to destroy his capacity to distinguish between right and wrong in regard to the particular act. Nevertheless, it would be easy to point out many modifications and additions to the above instructions by various courts. The fact is, the judges who are called upon to try these cases see the miserable victim of disease before them; hear the story of his freaks and fancies from the lips of friends and neighbors, and the testimony in his favor of distinguished experts, with whom, perhaps, they may be personally acquainted. Thus the conviction of his insanity becomes irresistible, and they feel constrained to construe the law in such a manner as to afford him protection. Dr. Ray, after examining a great many American cases, and the instructions given to the juries in cases of insanity, says: "The loose, vague, and contradictory tests of that kind of insanity which alone can be regarded as a sufficient excuse for criminal

acts are strongly illustrated in this summary of American decisions. * * * In this country, as in England, the insufficiency of the old tests of responsibility has been generally recognized, and here all harmony of opinion ends. And what the true test really is remains as far from being settled as ever." And after a life-time devoted, with extraordinary patience and ability, to the study and care of the insane, the results of which are embodied in his great work on the medical jurisprudence of insanity, Dr. Ray comes to the conclusion that no test of insanity can be found. He says: "It is a truth which no assumption of superior wisdom, no blind conservatism, can destroy, that, with hardly a single exception, these 'rules of law' on the subject of insanity are in conflict with well-settled facts of mental disease. They would never have been made, we are quite sure, by persons practically acquainted with the insane mind. To such it is well known that in every hospital for the insane are patients capable of distinguishing between right and wrong, knowing well enough how to appreciate the legal consequence of their acts, acknowledging the sanctions of religion, and never acting from irresistible impulses, but deliberately and shrewdly."

As a rule, the tendency of the courts of the different states of the Union is away from the so-called tests of insanity heretofore laid down, and towards the true position, which regards insanity as a fact, to be established as any other fact.

The supreme court of New Hampshire has been the first to break entirely away from the old tests. It would seem as though the position taken by it must be true, it is so in harmony with fundamental principles of law and justice on the one hand, and with what is recognized as true by science on the other. In the case of *Boardman v. Woodman*, 47 N. H. 120, a will was disputed on the ground of insanity; the decision was rendered in accordance with the usual tests and definitions of the disease, and it was subsequently sustained by a majority of the full bench. Judge Doe maintained, in his dissenting opinion, that "whether B. had a mental disease was a question of fact for the jury, and not a question of law for the court. Whether delusion is a symptom or a test of

any mental disease was a question of fact, and the instructions given to the jury were erroneous in assuming it to be a question of law. The jury should have been instructed that, if the writing propounded in the probate court was the offspring of mental disease, the verdict should be that B. was not of sound mind. Insanity, other than the healthy absence of development in infants, is the result of a certain pathological condition of the brain—a condition in which the intellectual faculties, or the moral sentiments, or the animal propensities, have their free action destroyed by disease, whether congenital or acquired—and the tests and symptoms of this disease are no more matters of law than are tests and symptoms of any other disease in animal or vegetable life. If a jury were instructed that certain manifestations were symptoms or tests of consumption, cholera, congestion, or poison, a verdict rendered in accordance with such instructions would be set aside, not because they were not correct, but because the question of their correctness was one of fact, to be determined by the jury upon the evidence. Experts may testify to the conditions of mental disease, as they could not if such indications were matter of law."

In a case tried not long after, in the same state (*State v. Pike*), Chief Justice Perley instructed the jury "that, if the killing was the offspring or product of mental disease in the defendant, the verdict should be, 'not guilty, by reason of insanity;' that neither delusion, nor knowledge of right and wrong, nor design or cunning in planning and executing the killing, and escaping or avoiding detection, nor ability to recognize acquaintances, or to labor, or transact business, or manage affairs, is, as a matter of law, a test of disease; but that all symptoms and all tests of mental disease are purely matters of fact, to be determined by the jury."

"A striking and conspicuous want of success," said Judge Doe, in the same case, "has attended the efforts made to adjust the legal relations of mental disease. * * * It was for a long time supposed that men, however insane, if they knew an act to be wrong, could refrain from doing it. But whether that suspicion is correct or not is a pure question

of fact; in other words, a medical supposition; in other words, a medical theory. Whether it originated in the medical or any other profession, or in the general notions of mankind, is immaterial. * * * The knowledge test in all its forms and the delusion test are medical theories introduced in an immature stage of science, in the dim light of earlier times, and subsequently, upon more extensive observations and more critical examinations, repudiated by the medical profession. But legal tribunals have claimed these tests as immutable principles of law, and have fancied they were abundantly vindicated by a sweeping denunciation of medical theories, unconscious that this aggressive defence was an irresistible assault on their own position. * * * In this manner opinions purely medical and pathological in their character, relating entirely to questions of fact, and full of errors, as medical experts now testify, passed into books of law and acquired the force of judicial decisions. Defective medical theories usurped the position of common-law principles. * * * Whether the old or the new medical theories are correct is a question of fact for the jury; it is not the business of the court to know whether any of them are correct. The law does not change with every change of science, nor does it maintain a fantastic consistency by adhering to medical mistakes which science has corrected. The legal principle, however much it may formerly have been obscured by pathological darkness and confusion, is that a product of mental disease is not a contract, a will, or a crime."

In conformity with this view, the same judge, in a subsequent case (*State v. Jones*), tried in October, 1870, gave the following instructions to the jury: "If the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, the verdict should be, 'not guilty, by reason of insanity,' if the killing was the offspring or product of mental disease in the defendant. Neither delusion, nor knowledge of right and wrong, nor design or cunning in the planning and executing the killing, and escaping or avoiding detection, nor ability to recognize, or to labor, or

transact business, or manage affairs, is, as a matter of law, a test of mental disease; but all symptoms and all tests of mental disease are purely matters of fact, to be determined by the jury. Whether the defendant had a mental disease, and whether the killing of his wife was the product of such disease, are the questions of fact for the jury. Insanity is mental disease—disease of the mind. An act produced by mental disease is not a crime. If the defendant has a mental disease, which irresistibly impelled him to kill his wife—if the killing was the product of mental disease in him—he is not guilty; he is innocent—as innocent as if the act had been produced by involuntary intoxication, or by another person using his hand against his utmost resistance. Insanity is not innocence unless it produced the killing of his wife. If the defendant had an insane impulse to kill his wife, and could have successfully resisted it, he was responsible. Whether any insane impulse is always irresistible is a question of fact. Whether, in this case, the defendant had an insane impulse to kill his wife, and whether he could resist it, are questions of fact. Whether an act may be produced by partial insanity when no connection can be discovered between the act and the disease, is a question of fact.” The defendant was convicted, and appealed to the supreme court, where the instructions of Judge Doe to the jury were affirmed. Judge Ladd, in an able, learned, and luminous opinion, wherein he reviewed all the leading cases of England and this country, repeated the doctrine of the *State v. Pike*. This case is decided in *State v. Jones*, 50 N. H. 381. In closing his opinion, Judge Ladd says: “It confirms me in the belief that we are right, or, at least, have taken a step in the right direction, to know that the view embodied in this charge meets the approval of men who, from great experience in the treatment of the insane, as well as careful and long study of the phenomena of mental disease, are infinitely better qualified to judge in the matter than any court or lawyer can be.”

Against the course of these judges, so strongly in harmony as it is with the established principles of law, it would be

difficult to offer a satisfactory objection. However necessary the present practice may have been in former times, when juries were ignorant of the little that was known respecting insanity, and were obliged to rely on the courts for information, that necessity is now fully obviated by the service of counsel and the testimony of experts. The doctrine established in these cases, on this important subject, is not one likely to result in the escape of malefactors from punishment, or afford encouragement to a fictitious defence of insanity. It does not furnish any easy test of disposing of these cases, but requires that the whole matter in each case shall be fully investigated, and then decided upon its merits. The question to be decided in each case is: Was the criminal act the offspring of disease? not whether the accused knew right from wrong. This way of putting the question obviates the objection suggested by the principle that insanity, of whatever form or degree, does not absolve from the usual consequences of crime; because it will be observed that the prisoner is acquitted, not for the reason that he is insane, but that the criminal act is the offspring of disease. We believe that the doctrine adopted in these cases is the true one. We have faith it will prevail, because it is true; and that in a few years the old, changing, untrue, unreliable, and unscientific tests of right and wrong will go the way of the "wild beast" test once so confidently relied on.

We had intended to notice an article in the last American Law Review, entitled, "Insanity as a Defence in Criminal Cases," wherein, taking the position that *punishability* is the sole question in a criminal case, the writer comes to the conclusion that the rules established by the English judges, in their answers to the House of Lords, are the best possible for the practical administration of criminal law. From what has preceded it will be seen that we differ entirely from that conclusion. But this paper has already grown so lengthy that there is no room for further comment.

J. G. LODGE.

VI. BOOK REVIEWS.

COMMENTARIES ON THE LIBERTY OF THE SUBJECT, AND THE LAWS OF ENGLAND RELATING TO THE SECURITY OF THE PERSON. By JAMES PATTERSON, Esq., M. A., Barrister at Law; sometime Commissioner of English and Irish Fisheries, etc. In two volumes. London: Macmillan & Co. 1877.

If these two volumes do not command an extensive sale, then there will be serious reason to apprehend that the members of the legal profession, in England and in this country, have lost all taste for novelty, and that they no longer have any speculation in their eyes. It having been rumored, some time ago, that the author was engaged in writing a commentary on the laws of England, intended to supersede the commentaries of Blackstone, we supposed that the present book was a light pinnacle sent out to announce the coming of the heavier and statelier vessel; but on reading the book we find that these two volumes are the first instalments of the all-embracing commentaries on the laws of England. So much the better. Here we are *in medias res*, and we may fall to at once, without spending any of our time in idle dalliance, with the satisfaction of knowing that we shall have food enough to appease any ordinary appetite.

It will not do, however, to begin to read the book anywhere but at the beginning. Those readers whose habit is to begin to read a book just where they happen to open it—reading a little somewhere about the middle, then the conclusion, then the beginning, and so on, in defiance of the implied wishes of the author—will find here that their usual plan of reading, however seriously considered and maturely adopted, is not at all applicable in the present instance. The ancient chancery pleaders, whose profound wisdom and sagacity—perhaps we should call it rich and varied culture in these days—were only equalled by their unparalleled candor, resplendent and overflowing in every word and act, had thought out a scheme that was admirably adapted for the purpose of heading off the desultory class of readers to which reference has been made. They

made it a rule never to insert a full stop in any of their pleadings, so that whoever should read any part of a pleading would be compelled to read all of it; a device which may justly be regarded as one of the brightest triumphs of human genius.

Our author has not adopted the plan of the chancery pleaders, which, being thought, perhaps, to be too cunning for the common measure of intelligence allotted to the sons of men, may have contributed to the recent and complete overthrow of the chancery system in England. So far from following these pleaders is he, that this author is by no means deficient in full stops; but we might very reasonably object to his constant use of dashes in place of commas—those dashes which Mr. Hare has referred to as “notes of admiration laid prostrate”—a style of punctuation—we think—exceedingly graceful in some kinds of writing—such—for instance—as magazine poetry—intended to gently move—but not deeply distress—the passions of the human heart; but we doubt whether they should constantly be introduced into a law book, though they might possibly be profitably used to show where a qualifying principle comes in, and thus to serve as a timely notice to the advocate as to the place where he should stop reading to the court. But it is by the mere arrangement of his matter that our author leads captive the capricious will of the random reader. As the last chapter in the last volume relates exclusively to the burial of the dead and the rights and duties of sepulture, one who had not read the previous chapters would be at a loss to know what this has to do with the laws regarding the liberty of the subject. We believe, indeed, that the grave has sometimes been mentioned as a prison, but it is one from which no inmate can be extricated by any writ known to the law. The King of Terrors may be supposed to laugh at the Habeas Corpus Act, and he seems to have had no particular respect for Lord Shaftesbury, its author. But we shall not deny that a chapter on death may form a fit conclusion to almost any book; as to any matter of arrangement, it would seem to come in much better at the end than at the beginning. From Westminster Hall it is but a stone's throw to Westminster Abbey, in which gorgeous dust-bin we may suppose our author to have walked an hour—filled with the sad reflections of Addison on a like occasion—when his book was nearly done. We shall not controvert the utility of a timely sadness. A great English philosopher remarked that he liked to read Virgil's *Æneid* before going to bed, as it left his mind in that pleasing state of melancholy which best disposed

him to sleep. It seems to be a pity that this species of sadness is so little within the reach of the common people. The recollection of unpaid grocers' bills seems to have a different effect. But as a pleasing state of melancholy can only be produced in different minds by different methods, it is doubtless well that various expedients shall be resorted to, so that every man may find something to fit his case.

Having gone through the work with unusual pleasure and a good deal of profit, and having seen that at last we are to become but "a little heap of dust," part of death's estate in fee simple, we shall now return to the introduction, containing 186 pages, which forms an imposing vestibule for the whole fabric of jurisprudence. We should willingly linger with the author while he treats of the origin and formation of laws in general, if space would permit; but we are somewhat under the impression, too, that not very much can be got out of that subject. When the old Göthe, who was familiar with the writings of Bentham and Kant—indeed with everything, from the oldest fragments of ancient literature to the last thin volume of Servian poetry, or the last English review—was asked by Eckermann whence proceeded law and morals, he answered, "From God, like everything else," implying that nothing more was known on the subject. We do not know that any better answer has been given. One vital point, however, we may examine, with such brevity as our limited space may require.

The author's proposed arrangement of the law, which is altogether novel, and is peculiarly his own, must find its justification, if it is to be justified at all, in his fundamental conception of what the law is. Every one knows what the word "law" means; but when it comes to telling what it means, a real difficulty sets in. It is a very old saying that definitions are perilous. In order to meet the apprehended trouble, the author gives a great many definitions prepared by authors both ancient and modern, curiously enough omitting, however, that of Montesquieu. Many of these are no definitions at all, but only general eulogies—such, for example, as that of Hooker, which our author particularly marks for its eloquence: "Law has its seat in the bosom of God; has a voice which is the harmony of the world; the least feel her care, and the greatest are not exempt from her power; and angels and men and creatures admire her as the mother of their peace and joy."

Whether eloquence is anywise dependent on truth or coherence has not, perhaps, been quite fully settled. It would probably not be

safe to push that enquiry very far. Perhaps a better man than Hooker never lived ; and he was possessed of very remarkable ability. There is a strange pathos in his memory, growing out of the fact that he was the worst hen-pecked husband of whom history has made any mention, Socrates himself not excepted. But in the instance in question his accuracy may well be doubted. Admitting that he might know what the angels think of law, his opinion as to what the lower animals think of it is, it must be conceded, of no great value. That the law is invariably the mother of peace and joy is a proposition which must also be held over for discussion. The writer would not have read far in the laws of nature before reaching the sad chapters of sin, suffering, bereavement, and death. Human laws have sometimes produced great good, but they have also often produced great evil. The overworked dray-horse, if capable of reasoning on the subject, would probably, so far from finding in the law the mother of his peace and joy, have a very poor opinion of laws in general. But this was that optimism that was afterwards made fashionable by Pope's *Essay on Man*, that finally made the cheap staple of English philosophy in the eighteenth century, as prevailing then, as the philosophy of evolution is now ; which wove its soft enchantments in the mind of Blackstone ; which held its ground against argument, reason, and common sense ; but which at last disappeared before the irony of *Candide*, never having the heart to even attempt a reply.

In order to make it appear that the law is the best of all possible good things, Blackstone marred his definition by adding to it the phrase, "commanding what is right and prohibiting what is wrong." He must have well known that municipal law has often commanded what was wrong and has prohibited what was right. Kent wisely left off this superfluity, which could form no part of a definition proper—which was only a flourish borrowed from Cicero, who applied it to the will of the sovereign Jupiter, it being applicable enough to the will of the Jupiter of the philosophers, but as little applicable to the fallible will of man as to that of the Jupiter of the poets.

Our author objects to the definition of Blackstone on another ground. He says that the law does not prescribe a "rule of civil conduct" at all. "The law," he says, "cares, indeed, very little as to the course of any man's conduct ; it neither undertakes to teach him, nor does it profess to know what his course of conduct is or ought to be. It prescribes nothing positive at all in the prin-

cial heads ; what it says is only negative. It does not command ; it only prohibits. It gives no positive directions, either of morality, religion, justice, or good feeling. It merely restrains the actions of individuals in a few out of the variety of his occupations, and points out a formal mode of carrying out a few others."

To a plain man this must appear as wholly hypercritical. Many of the commands of the law are affirmative—such as commands to pay taxes, to serve in the public defence, and so on. But a prohibition is also a command—a command to abstain from something. The Mosaic decalogue is made up of negative commands or prohibitions, yet these prohibitions are properly called the ten commandments. Our author cannot maintain his proposition without overthrowing all the usages of speech.

We also think that the law forbidding murder is a rule of civil conduct, applicable to a particular duty. True, no law, no code of morals, ever attempted to provide a system of rules which should govern every possible or probable action in life ; but a definite command as to a class of actions is none the less a rule, as far as it goes. According to our author, a rule of conduct cannot exist, since it cannot comprehend every possible case. Yet, the father prescribes rules for his children ; the supreme power does the same for its citizens. If these are not rules of conduct, then there are no rules of conduct, and there never will be any rules of that kind.

Our author then propounds his own definition. "Law," he says, "is the sum of the varied restrictions on the actions of each individual, which the supreme power of the state enforces in order that all its members may follow their occupations with greater security." This definition will not, we fear, meet with universal favor. By "actions" we understand the author, of course, to include words as well. We have already said that the law is not wholly made up of restrictions ; nor do we think that the existence of the law depends on the rigor of its enforcement, that having reference to its efficiency. If the queen should pardon every murderer that might be convicted, the statute against murder would still be a law. The phrase, "in order that all its members may follow their occupations with greater security," is a superfluity that exceeds the superfluity of Blackstone. The motive—sometimes good, sometimes bad, and often unknown—with which a law is made has nothing to do with the definition of the word "law." The author might as well include a description of the Parliament Houses on the Thames. It is difficult to see in what sense the word "occupations" is

used ; generally it refers to one's chief business or pursuit in life. But our author tells us that the Sunday laws were made in order to protect men in their "occupations," because it is the "occupation" of many persons to keep Sunday. Perhaps there is not a man in the world who would say that his occupation was keeping Sunday. We fear that the author has never mastered the distinction between vocations and avocations. A man can hardly be said to have any occupation if his time is wholly unoccupied. There are drones in society, small children, and children unborn, who are all under the protection of the law, not on account of their "occupations," but on account of themselves. It is the singular infelicity of this definition that no part of it is good. A Jewish law requiring a man to marry his deceased brother's widow is a positive and affirmative command ; an English law forbidding a man to marry his deceased wife's sister is a restriction ; but this restriction can hardly be supposed to have been made in order that the members of the state "may follow their occupations with greater security," unless we concede that the not marrying of a deceased wife's sister is to be looked upon as an occupation.

On this faulty foundation the author proposes to arrange all the law under the following heads :

I. Substantive Law.—1. Security of the Person. 2. Security of Property. 3. Security of Marriage. 4. Security of Public Worship. 5. Security of Thought, Speech, and Character. 6. Security of Contracts and Business. 7. Security of Foreigners.

II. Administrative Law.—8. The Judicature. 9. The Legislature. 10. The Executive Government (including local self-government).

The author calls this a "simple tabulated form." When Mr. Titmouse first read to the young lady of his heart that admirable production of his muse, which still helps to keep his memory fresh and green, beginning with the exquisite lines,

"Tittlebat Titmouse is my name,
And England is my nation,"

the young lady expressed it as her opinion that it was "beautiful, beautiful in its own simplicity." We confess to a secret apprehension that an arrangement that takes no note of the distinction between civil and criminal law may be found to be more simple than convenient or acceptable. The criminal lawyer who has to look up a maxim in his favorite department of the law, and who

finds it buried away between something relating to the doctrine of *cy pres* and something relating to incorporeal hereditaments, may fairly be expected to express his disapprobation with such mild expletives as are not inconsistent with the benignity of his character and the unvaried sweetness and serenity of his temper.

But, aside from the novelty of the arrangement, the book is very well and ably written. The learning of the author is undoubted, his style is unusually agreeable, and his citations are very full. He makes frequent references to the laws of other countries. Some of them make it appear doubtful whether our own laws are best adapted to the means which they seek to attain. Thus, our collection laws are equally complex and inefficient; but our author tells us that, in Corea, if a man does not pay he is beaten on the shins until he finds the means to pay, so that nobody ever loses any money. Corea is a far older nation than ours. Doubtless our wisdom, too, will increase with increasing centuries. Here, however, is a reform which we might introduce at once. But that is a matter which we must submit for the judgment of the American statesman, who, though he is always going about doing good, may possibly find time to think of these things.

U. M. R.

REPORTS OF LIFE AND ACCIDENT INSURANCE CASES DETERMINED IN THE COURTS OF AMERICA, ENGLAND, SCOTLAND, AND CANADA, DOWN TO SEPTEMBER, 1876. By MELVILLE M. BIGELOW. New York: Published by Hurd & Houghton. Cambridge: The Riverside Press. 1877.

The early appearance of this volume, the fifth in the series, within six years from the appearance of the first, furnishes a new evidence of the growth of that side of the business of life insurance which has to be transacted in the courts. Is there some reason, inherent in the scheme of insurance on human lives, which leads those who invest in the scheme into undue and excessive litigation? Or is it the fact that life insurance affords so many controversies for the courts simply because it is an institution of such enormous proportions and has had so rapid growth? These are questions for social scientists and political economists. The lawyer, as such, may not care to become involved in them. But even he may well cast his glance backwards to see what changes have taken place in the kind and character of the controverted questions that grew out of the system, and what have been the influences of jurisprudence and life insurance each upon the other. Mr. Bigelow's new volume

furnishes the occasion, if not the suggestion also, of such a retrospective review of the law relating to life insurance.

The peculiar plan upon which this series of special reports is constructed, viz., of grouping them together by states for limited periods of time, does not furnish the best means for such an investigation. If the reporter had commenced his labors by reporting first the earlier English decisions, and had continued his reports by successive chronological periods, each volume being complete to a certain date, we might then have traced continuously the changes and mutations in the doctrines advanced, and the regular growth and progress of this branch of the law. Mr. Bigelow's cases are too much scattered, chronologically, for this study. But we may gain something of our quest by comparing the first volume with the later ones. We may learn to some extent what rules of law are settled, and what new principles, if any, are introduced.

First of all, the legality of the business has become unquestioned ; so that it can no longer be necessary to decide judicially, as in *Lord v. Dall*, 1 Big. 154, that the contract of life insurance is legal. But the question of insurable interest, which arose in the same early case, still remains an interesting and somewhat unsettled question. That there must be an interest of some kind in the insured life was settled in several cases in the reporter's first volume, and has not yet become unsettled. We find nothing in the present volume on any branch of this question, though some late cases not here printed treat of it.

The weight of authority seems to be in favor of the rule that, outside the relation of husband and wife, there must be, as among relatives by consanguinity, a "well-founded expectation of advantage to be derived from the continuance of the insured life," thus putting even relationship upon the footing of all other pecuniary interests. One case in Mr. Bigelow's fourth volume held that the assignee of a life policy must be one who has also an insurable interest in the life ; a doctrine which had before received the assent of several courts, but was met by others with dissent.

The case of *Summers v. U. S. Ins. Co.*, 1 Big. 131, is noticeable as one which is little likely to be paralleled in any subsequent volume, being a case of an insurance upon the life of a slave by his owner.

On certain trite subjects the present volume discloses the usual number of decisions. Under the head of Insurance Agents the doctrine remains as settled in the case of *Wilkinson*, 3 Big. 810,

that parties dealing with such agents may presume that they have the right to do all acts within the scope of their apparent employment, as, for instance, to waive any of the ordinary conditions of the policies (see *Mississippi Valley Life Ins. Co. v. Neyland*, 5 Big. 152), and that, in the absence of collusion, the insurers are bound by the answers of the applicant to their questions, written by their agent. See *Flynn v. Life Ass. Soc.*, 5 Big. 409.

The prolific themes of Misrepresentations and Warranties are still quite largely the subject of a controversy, into the details of which it would be unprofitable here to examine closely. It may be noted, however, that upon the subject of warranties the Supreme Court of the United States has spoken with no uncertain voice in the cases of *Jeffries and France* (5 Big. 572, 587), holding that the materiality of such warranties in life insurance is itself wholly immaterial; whatever the insured party has warranted as true must be so literally. Whether these decisions will control the contrary opinions heretofore held by several state courts, we may wait to see, though with doubts.

Under the subject of Death in Violation of Law we observe a paucity of cases, from which we infer, not that there are fewer cases, but that those arising under this head are generally classed under more particular subdivisions, such as suicide, as to which the policies now make special reference. But the changes noticeable under this particular title are important. The controversy over the question whether the clause excluding from the policy "death by suicide" or "death by his own hand" meant suicide resulting from irresistible insanity was closed by the decision of the United States Supreme Court in the negative, in *Life Ins. Co. v. Terry*, 3 Big. 819. But insurers at once elected to exclude even that class of cases from their policies by the use of the words of further limitation, "sane or insane." Their right to interpose such a limitation has been sustained in *Chapman v. Republic Life Ins. Co.*, reported in 5 Big. 110, following *Pierce v. Travelers' Ins. Co.*, 4 Big. 498, and *Snyder v. Mutual Life Ins. Co.*, 4 Big. 424. The same conclusion has been reached by the Supreme Court of the United States (not announced in time for our reporter's fifth volume) in the case of *Bigelow v. Berkshire Life Ins. Co.*, 4 C. L. J. 53.

The fertile subject of Premiums, their payment, and how and when paid, including also forfeiture for non-payment, presents, as usual, a large number of cases. The rule requiring punctual pay-

ment on the anniversary of the policy, in order to keep it alive, still retains the support of some of the courts. *Russum v. St. Louis Mutual Life Ins. Co.*, 5 Big. 243; *Yerger v. St. Louis Mutual Life Ins. Co.*, 5 Big. 248. The tendency to give relief against the forfeiture resulting from non-payment, in cases of great hardship, on equitable grounds, as in *St. Louis Life Ins. Co. v. Grigsby*, 4 Big. 633, seems to be now met and counteracted by such cases as *Anderson v. St. Louis Life Ins. Co.*, 5 Big. 527, and *Frazer v. St. Louis Life Ins. Co.*, in the United States circuit court for middle district Tennessee (Emmons, J.), not reported by Mr. Bigelow. But days of grace on the payment of premium have been allowed to the insured by the court, so as to save the forfeiture, where the practice of the company to allow the same in prior instances was proved. *Garber v. Globe Life Ins. Co.*, 5 Big. 221. And in several cases the courts have apparently gone far in relieving from attempted forfeitures; more especially in the class of cases scheduled under the new title, "Ten-Year Plan of Insurance." These cases seem generally to involve the feature of a forfeiture for failure to pay interest on the notes given for premium; which forfeiture the courts are inclined to refuse to sanction, so far, certainly, as to save to the insured his paid-up policy for the proportionate amount of payment he has made. *Ohde v. Northwestern Mutual Life Ins. Co.*, 5 Big. 145; *Hull v. Northwestern Mutual Life Ins. Co.*, 5 Big. 558; *Little v. Northwestern Mutual Life Ins. Co.*, 5 Big. 137. But it should be observed that in these cases there were somewhat obscure and contradictory clauses of the policy, which influenced the courts in deciding against the insurer, whose language they were.

With the introduction into the reported cases of the new feature of life insurance described by the phrase, "Ten-Year Plan of Insurance," we meet also the title of "Non-forfeiting Policy." We had heard, in 2 Bigelow, of English "Indisputable Policies," and of a case in which the insurer was the "London Indisputable Life Policy Co." In the United States the same style of catchpenny advertisement seems to have taken the title of "Non-forfeiting Policy," but to have been received with indifferent favor by the courts. True, in *Warden v. Guardian Life Ins. Co.*, 5 Big. 360, such a label on a policy was held of some use in a case where the policy allowed thirty-five days after the anniversary for payment of the premium, as showing that no forfeiture should be declared for non-payment within such thirty-five days; but this was little more than

an allowance of "days of grace." But in *Gates v. Home Life Ins. Co.*, 5 Big. 467, a label of "non-forfeiting" on the policy was held of no account at all as against its express provision that it should be null and void if the premiums were not promptly paid on the day fixed.

The subject of amalgamation of life insurance companies is one of the new 'ones demanding judicial attention in Mr. Bigelow's latest volume; but he reports only English decisions, and these all hold the policy-holders bound by the proceedings for consolidation. Recent events in the history of life insurance in this country have resulted in a very general amalgamation of companies, whose proceedings are already demanding attention in the courts, and taxing the skill and acumen of the judges; and we think their decisions have tended to limit considerably the scope and extent of amalgamation as heretofore practised, so far as concerns the rights of policy-holders. But none of the American cases have yet enlisted Mr. Bigelow's attention.

Our conclusion, from the meagre investigation we have been able to make, is that most of the changes apparent in the character of the questions presented for adjudication arise from the varying practices of the insurance companies, stimulative of their business, during the late period of hot-house growth; while some others result from the efforts of insurers to avoid the consequences of adverse decisions by the courts. As a general rule, we think, the courts are inclined to uphold the terms of the life insurance contract in all respects, save those in which it may trench upon or violate any of the old and well-established rules of our Anglo-Saxon jurisprudence, and these we find the most conservative courts still anxious to maintain. Any device of the insurer by which he may seek to overturn established principles—as, for instance, this, that no person can be the agent, at the same time, of two different parties in and about a contract or negotiation where their interests are adverse to each other—will always be brought to naught in the judicial tribunals. But the great majority of the conflicts of opinion among the courts arise in that broad middle ground where it is hard to determine just how the old and familiar principle of law shall be applied to the new case; and the different results attained are almost as various as are the different judicial minds of our thirty-eight state appellate courts. It is not likely that these conflicts of opinion can be terminated by a meeting of minds upon any common ground, unless the coming American statesmen

will agree to give us such a national or federal system of regulation of insurance matters as will vest in the United States courts plenary jurisdiction over all insurance litigations. In such a case we might hope to see an orderly and intelligible fabric of jurisprudence evolved out of the present chaotic law of life insurance.

P.

TREATISE ON THE UNITED STATES COURTS AND THEIR PRACTICE.

By BENJAMIN VAUGHAN ABBOTT. Third Edition. Rewritten and Corrected Conformably to the Revised Statutes and Recent Decisions. Vol. I. Enactments, Organization, Jurisdiction. Vol. II. Original Suits, Review, Forms. New York: Ward & Peloubet. 1877.

The separate appearance of the first volume of this new edition of Mr. Abbott's Treatise was noticed in our last issue. The completed work is now at the service of the profession. We find it very considerably rewritten and rearranged. Mr. Abbott's experience as digester, annotator, and codifier of federal decisions and statutes has admirably fitted him for the preparation of this treatise. We fear, however, that in the press of professional labors he has not made the most of his superior advantages. In certain respects the work will fail to fill the practitioner's idea of a full treatise on the practice of the federal courts, and a complete treatise on this subject is still a *desideratum*.

The space necessary to treat this subject has grown with all the progress of the federal judiciary and all the growth of its jurisdiction. When Du Ponceau's "Dissertation on the nature and extent of the jurisdiction of the courts of the United States" appeared, in 1824, it occupied but 130 small pages; it was mainly devoted to the question of the extent of the common-law jurisdiction of those courts, and their practice was a matter of minor consideration. Mr. Conkling's "Treatise" was a modest volume on its first appearance, but it gradually grew to rather stout proportions. Mr. Abbott finds it necessary to occupy two volumes with his management of the subject.

The first volume opens with 200 pages of statutes taken bodily from the United States Revision, and entitled, by the compiler, "Statutes of Practical Utility." The second closes with 266 pages of forms, such as Mr. Abbott recommends suitable for practice and pleading in the various departments of federal procedure. Between these are found the 700 pages of his "Treatise;" that portion in

the first volume being devoted to the organization and jurisdiction of the federal courts, and the remainder in the second volume treating of their procedure. The arrangement of the work is thus seen to be somewhat factitious, and at war with "the unities." Possibly, practitioners in general may be glad to have the statutes, a treatise on jurisdiction, another on procedure, and a collection of forms, gathered in two volumes of one work, as in this case. We will neither speak for nor criticise those who have such a preference; but, for ourselves, we beg leave to say we would have preferred the author's text in one volume, and his very useful selection of statutes, with his excellent collection of forms, in another. If, under this mode of treatment, Mr. Abbott's 700 pages of treatise should themselves expand into two volumes, we are sure a generous profession would warmly welcome all he might find it in his heart to say on the subject.

For we observe with pleasure the exercise of a very nice discrimination in the arrangement of the author's text. Our federal courts are so peculiarly limited as to their jurisdiction, that any work of the kind would be incomplete which did not treat thereof. Mr. Abbott opens with very pleasant and thoughtful essays on the organization and powers of the federal judiciary. The general arrangement of the courts, and the several courts themselves, each receive brief attention; after which the respective subjects of their jurisdiction are, each in turn, briefly discussed. Here we notice short chapters on Admiralty and some of its subdivisions, and also on Bankruptcy, these particular topics being already dignified by distinct treatises of other authors. But a fair elementary essay on Copyright, and another quite full one on Patents, give a taste of Mr. Abbott's abilities as a text-writer, and show how easily and agreeably his other essays might have assumed large proportions.

Under the head of Procedure we are fairly launched upon the sea of federal court practice; but the chart our author furnishes us, though excellently designed, is not complete in details. He gives us eighteen chapters or sub-topics under the general head of "Procedure in the Exercise of Original Jurisdiction," and four under the corresponding title as to "Appellate Jurisdiction," thus disclosing an excellent plan. But the topic "Removal of Causes" relates wholly to practice, and no fitter place could be found than this treatise of Mr. Abbott for a full dissertation on the subject, which is here dismissed with less than twelve pages, closing with a reference to, and endorsement of, Judge Dillon's admirable monograph on this subject. So, too, under the heading of Procedure in the Supreme

Court in Appeals, the reader is relegated to Mr. Phillips' treatise for a discussion of the practice of that court in the hearing of cases. These instances indicate that the author tired of his work before its completion. Nor was he entirely faithful when, under the head of Depositions, he omitted to note the effect of the Revised Statutes in taking away the right to examine witnesses orally in equity causes, which left the oral examination of witnesses in such causes discretionary with the circuit court, as settled in *Blease v. Garlington*, 92 U. S. 1.

Numerous typographical errors indicate that Mr. Abbott was not felicitous in his choice of publishers, or rather that his publishers were not fortunate in their choice of printers. Certain of these are unpardonable. For instance, in Vol. 2, at page 123, it is said, "The general principle is recognized by the United States courts that a deposition taken according to the rules of law must be excluded if timely objection is made." This reminds one of Mrs. Partington's appeal to "a court where justice is dispensed with." Again, at page 40 of the same volume, it is said of the general system of "Removal of Causes" before referred to, and of which Judge Dillon's pamphlet treats, that it "relates to suits or proceedings originally commenced in a state court, but allowed to be removed to a national court at the instance of *the defendant*, because it is deemed that *he* has the right to invoke the national jurisdiction in preference to that of the state, if *he* prefers to do so." But no; on examination we are unable to assign this error either to the careless printer or to the usually punctilious author exclusively; we must let them divide the responsibility and share the honor. These are blemishes; but "accidents will happen in the best regulated families"—when they get into too great a hurry.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE STATE OF WISCONSIN, WITH TABLES OF THE CASES AND PRINCIPAL MATTERS. O. M. CONOVER, Official Reporter. Volume XLI. Containing Cases Determined at the August Term, 1876, and at the January Term, 1877. Chicago: Callaghan & Co. 1877.

In a memorandum on the fifth page the reporter, under date of July 9, 1877, says:

"All the cases reported in this volume, except the first two, have been finally determined since the day fixed by law for the commencement of the January term, 1877, still current; but so many of them as were thus disposed of before the court, in fact,

took up the calendar of this term, are here reported as of the August term, 1876. Since the commencement of the present year, Mr. Chief Justice Ryan has been prevented by impaired health from taking part in the deliberations of the court; and all decisions rendered since that time have been made by the concurrent judgment of Mr. Justice Cole and Mr. Justice Lyon alone. * * * The last four cases found in this volume (pp. 659-689) were decided on the 2d of June last, and were subject to motions for rehearing until the 2d of the present month. The volume has been delayed for a few days for the purpose of including these cases, all those finally disposed of at earlier dates being already printed."

As this volume contains decisions in over one hundred cases, without reference to decisions upon motions for rehearing, of which there are many, it seems that Mr. Justice Cole and Mr. Justice Lyon must have performed a great deal of labor during the six months ending with the 1st of June, 1877. Again, the promptness with which the work of placing these decisions in the hands of the profession has been accomplished is especially worthy of note. We are writing this notice in St. Louis on the 8th of August, though the motions for rehearing referred to by Mr. Conover were not determined in Madison until the 2d of July. This work seems to have been done, both by reporter and publisher, equally as well as it has been done promptly. The alphabetical table of cases reported includes, rather unnecessarily, we think, a repetition of the head-lines prefixed in italics to the syllabi throughout the volume. The syllabi appear to be well digested from the decisions, and the index sufficiently full, with ample cross-references. The cases cited in the opinions from Wisconsin Reports are compiled under the index heading, "Cases Cited," instead of comprising a table by themselves, as is the usual and, we think, the more convenient plan.

The mechanical execution of the volume is a model of neatness and good taste. Considering the rapidity with which the work of judges, reporter, and publisher has been accomplished, the book is singularly free from errors of omission or commission. A.

BOOKS RECEIVED.—"Dunlap's Abridgment of Elementary Law;" pocket edition; St. Louis: Soule, Thomas & Wentworth. "Mississippi Reports;" vol. 52; St. Louis: G. I. Jones & Co. "Waterman's United States Criminal Digest;" New York: Baker, Voorhis & Co. "Proffat on Notaries;" San Francisco: A. L. Bancroft & Co. "California Code;" pamphlet; San Francisco: Sumner Whitney & Co. "Freeman on the Enforcement of Judgments against Bankrupts;" second edition; St. Louis: The Central Law Journal.

VII. NOTES.

MORTGAGEOR.—We desire to enter our protest against the error which most lawyers persistently commit in writing *mortgagor* instead of *mortgageor*. We see this mistake frequently in the reports, and in the briefs and other documents written by lawyers. They certainly need to be informed as to the law upon this subject, and it is a law about which all *the judges* are agreed.

It is a general principle of orthoëpy that when an affix, beginning with a vowel, is added to a word ending with silent *e*, the final *e* is omitted, as *bride*, *bridal*; *guide*, *guidance*; *plume*, *plumage*; *use*, *usage*.

But to this rule there is this marked exception: when the silent *e* comes immediately after *c* or *g*, it is retained before an affix beginning with *a* or *o*, in order to prevent the pronunciation of these consonants with the hard sound, as *peace*, *peaceable*; *notice*, *noticeable*; *manage*, *manageable*; *change*, *changeable*.

It is under this exception to the general rule that the word *mortgageor* is to be classed. If we write it *mortgagor*, we should pronounce it, in order to be consistent, as if it were written *mortgaghor*, giving the hard sound to the *g*, as in *ghost*.
S.

THE OLYMPIC THEATRE AGAIN.—We are pleased to note that the managers of the Mercantile Library Hall have recently contracted for such changes in the building as will render its patrons safe from fire. The managers are to be congratulated on their practical sagacity in having the changes made, and made now before the fall season opens. We have no doubt that the increased rents for the use of the hall will well repay the outlay. The St. Louis public will not be slow, we think, to realize that they have *one* place of amusement that they can enter without serious apprehensions of being burned or crushed to death. It is to be regretted that the managers of the Olympic Theatre have not equal sound sense. They evidently are not believers in “manifest destiny,” else they would, we think, see that it is their manifest destiny to be “closed for repairs” at some inconvenient season, unless they take some convenient season to put their house in suitable shape to receive an audience. We note the case of the Globe Theatre in Boston last winter; it was closed by municipal authority, in the height of the season, soon after the Brooklyn calamity, and it was not reopened until very extensive changes were made. We most earnestly hope the Olympic may be subjected to similar treatment this winter. The law on the subject of public buildings is not in a very satisfactory state; but the city council have abundant power to pass an ordinance very stringent in its provisions, and they owe it to themselves and to their constituents to pass such an one at an early day. A holocaust at the Olympic Theatre is matter of almost absolute certainty unless measures are taken to

prevent it, and as there seems to be no disposition on the part of the Olympic managers to make changes except under compulsion, compulsion should be resorted to. We call attention to the matter now, as it is not unlikely that some novel legal questions will grow out of it. Our province ends here. But we suggest to the daily papers that the subject is one in which the St. Louis public have as great an interest, at least, as in essays on the society for the prevention of cruelty to animals, or the proper method of killing unclaimed curs, although those subjects justly claim their attention.

LAW REPORTING.—The case of *Melville v. Brown*, 15 Mass. 82, A. D. 1818.

In vol. 115 Mass. p. 100 is this note: "In the copy of 15 Mass. in the law library of the county of Berkshire is the following in the handwriting of Charles Sedgwick, son of Mr. Justice Sedgwick, and for a long time the clerk of the courts in that county: 'The history of the report of *Melville v. Brown* is this: Judge Jackson said to Mr. Tyng, "Why do you make such long reports? Why not state the points and the decision; that is enough." "Please give me a specimen report," said Mr. Tyng. Whereupon Judge Jackson instantler furnished the above, which is here inserted, *totidem verbis*. This I had from Ch. J. Shaw."

C. S.

September, 1846."

This fact was well known to many of the lawyers of that time. In 2 Greenl. Ev. § 646, note, it is said that *Melville v. Brown*, though briefly reported, was in fact "very elaborately argued and well considered." The late Mr. Justice Metcalf informed the writer that this case "was reported by Judge Jackson as a specimen of his idea of the true style of law reporting. He liked the style of *Strange*." But Sir Michael Foster in his *Crown Law*, 294, speaks of Sir John *Strange* as having "been over-studious of brevity." He was "a faithful reporter," said Lord Chief Justice Willes (2 Wils. 38), and no man was more conversant with the reporters, and competent to form a correct judgment, than this accomplished judge. Here is his epitaph:

ON *STRANGE*, A LAWYER.

Here lies an honest lawyer, and that is *Strange*.

F. F. H.

THE CHARGES AGAINST JUDGE DILLON, recently made in the columns of *The Nation*, have excited a great deal of comment throughout the country, and, in this part of it, a great deal of indignation against their author. Judge Dillon's printed answers to the charges are a sufficient refutation of them, and the letters in his defense by various persons, that have been published in *The Nation*, are simply cumulative evidence of their falsity. But Judge Dillon has been more thoroughly vindicated by the derision with which these charges have been treated by the bench, bar, journals, both legal and news, and almost the whole people of the eighth judicial circuit, than he could have been by any newspaper trial or legal investigation. *The Nation* has, by its eloquent and vigorous articles on the futility of "investigating committees," shown clearly how well it realizes that, at the present day, investigations

¹ It is to be observed that the chief justice was one of the counsel for the plaintiff.

investigate in an even less ratio than "protection protects." Investigating committees and "whitewashing" committees are justly regarded as almost synonymous terms, and the acquitted party is "whitewashed"—not authoritatively pronounced innocent. No sane man can weigh the report of a committee, be it what it may, against the indignant refusal of the five millions of people in the eighth judicial circuit to entertain, for an instant, the charges brought against Judge Dillon. Character counts for something with the people, and they are never wrong when, after a twenty years' test of a man's integrity and capacity in responsible stations, they declare, without a dissenting voice, that they know him to be honest. We speak only of the people of the eighth circuit, because he is known to them in his official and private capacity. It is seldom that any one filling a judicial station has so thoroughly gained the confidence and good will of bench, bar, and people as has Judge Dillon in his circuit. It will require "confirmation strong as Holy Writ" to induce them to consider, even, any charges affecting his official or private integrity. Judge Dillon is not without faults. We have sometimes wished, for his own sake, he had less kindness of heart and greater ability to say NO to some of those about him. But dishonesty, in any shape, is not among his shortcomings.

These charges seem prompted by the malice of an unsuccessful litigant, with the apparent design of destroying Judge Dillon's chances for the vacant seat on the Supreme Bench. As is well known, he is not our choice for this place; but the reasons therefor are geographical, not personal. If ability, learning, integrity, and judicial experience were the only requirements, few are equally well fitted for the place. But to these it is necessary to add residence in some section of the country not now represented in the Supreme Court. It is of national concern that each section of the country be represented there. The South, as we have before said, has had no representative for seventeen years, while for the last ten she has sent to Washington for decision more cases, and those involving greater interests, than any other section. There is no room for denying that in right, justice, and, we think, expediency, the vacant seat should be assigned her. From the jurists of the South, or of the whole country, as we said in a previous number, we know of none better and few as well qualified, by reason of learning, ability, experience, and integrity, to adorn the position of Associate Justice of the Supreme Court as Chancellor Cooper of Tennessee. But if the appointee is not to be Chancellor Cooper, nor a Southerner, then we hope Judge Dillon's name may be sent in for confirmation.

It seems to us that *The Nation* has, for once, made itself ridiculous. Had it, in 1865, accused Abraham Lincoln of taking bribes, it could scarcely have put itself in a more unseemly position. That the people of the whole country do not resent these charges against Judge Dillon as those of the eighth circuit have done, is because they do not know him, and have not that property in his reputation that the people of his circuit have—a property like that the whole country had in Lincoln's fame in 1865, less only in degree; and the sooner *The Nation* acknowledges the error of the ways of its correspondent who made the charges, and declares its own disbelief in them, the sooner it will extricate itself from a position that in no way does it credit.

VIII. DIGEST IN BRIEF OF RECENT CASES.

REPORTED IN FULL IN THE LAW JOURNALS SINCE LAST ISSUE.

PREPARED BY S. OBERMEYER, ESQ., OF THE ST. LOUIS BAR.

[The object of this department of the REVIEW is to advise our subscribers of points decided in the latest reported cases, and to show where they can obtain, at very small expense, full reports of cases in which they have an interest. To this end the points decided are briefly and pointedly given, with the abbreviation and date of the journal where the case is reported in full. The price of single numbers of each journal is also given, which, remitted to the address given, will secure a copy of any desired issue.]

NAME.	ABBREVIATION.	ADDRESS.	PUBLISHED.	PRICE.
Albany Law Journal.	Alb. L. J.	Albany, N. Y.	Weekly.	15 cents.
American Law Record.	Am. L. Rec.	Cincinnati, O.	Monthly.	50 cents.
American Law Register.	Am. L. Reg.	Philadelphia, Pa.	Monthly.	50 cents.
Central Law Journal.	C. L. J.	St. Louis, Mo.	Weekly.	50 cents.
Chicago Legal News.	C. L. N.	Chicago, Ill.	Weekly.	10 cents.
National Bankruptcy } Register Reports. }	N. B. R.	New York.	Semi-monthly.	50 cents.
Weekly Notes of Cases.	W. N. C.	Philadelphia, Pa.	Weekly.	20 cents.
Western Jurist.	West. Jur.	Des Moines, Ia.	Monthly.	50 cents.

ACTION.—Action for rent of real estate in foreign country and cost of building railroad there; Local action; Comity of nations.—Buenos Ayres, etc., *R. R. Co. v. Northern R. R.* (with note), *High Ct. Just. (Eng.)*, *Am. L. Reg.*, June, p. 359.

— The violation of a duty imposed by a municipal ordinance, and sanctioned by a fine, will not support an action on the case for special damages in favor of one injured by the violation and against the violator.—*Heeney v. Sprague*, *Sup. Ct. R. L.*, *Alb. L. J.*, June 30, p. 512.

ADMIRALTY.—Priority of liens; Mortgage liens postponed to all maritime claims where, by the general maritime or local law, a lien is given.—*Miller v. The Tug Alice Getty*, *U. S. Dis. Ct.*, *W. D. Mich.*, *C. L. N.*, June 9, p. 815.

— Practice; Appeal in admiralty from district to circuit court; Within what time to be taken; *Held*, that appeals in admiralty should be taken to the term of the circuit court next succeeding the term of the district court at which the decree was rendered.—*Drake v. Schooner Oriental*, *U. S. Cir. Ct.*, *N. D. Ohio*, *C. L. N.*, June 16, p. 321.

— *Held*, when a lighter loaded with phosphate rock was towed alongside the vessel intended to receive the rock, and made fast to the same with lines, that this constituted a delivery of the rock to the vessel, and if, afterwards, the rock be lost, the vessel would be held liable for the value thereof; Custom of port.—*Wylie & Co. v. The Bark Sunlight*, *U. S. Dis. Ct.*, *S. D. S. C.*, *C. L. N.*, June 16, p. 322.

— Lien on vessel for insurance premium; (Judge Brown's opinion, 8 *C. L. N.*, p. 401, endorsed by Mr. Justice Swayne.)—*Orient Ins. Co. v. Schooner Dolphin*, *U. S. Cir. Ct.*, *E. D. Mich.*, *C. L. N.*, June 30, p. 337.

ATTACHMENT.—Attachment execution; Right of several garnishees under one attachment to separate trials; Corporations, subscriptions to stock; When liable to attachment; Practice.—*Peterson v. Sinclair*, Sup. Ct. Pa., W. N. C., June 7, p. 97.

— Where a defendant fails to plead to a declaration filed in a suit commenced by summons, but enters a motion to quash proceedings in an attachment in aid of such suit, it is not error to enter a judgment by default upon the original suit pending the motion to quash; Entering a motion to quash an attachment is not such an *appearance* in the original suit as will preclude a judgment by default.—*Schulenberg v. Farwell*, Sup. Ct. Ill., C. L. N., June 30, p. 344.

BAILMENT.—*Held*, that a pledgee may sell a pledge if unredeemed in his hands, and his vendee under such sale will hold the pledge as against the pledgor until the amount it was pledged to secure is paid; Such vendee takes all the interest of the pledgee in the pledge; That before the pledgor can maintain replevin, he should tender to the person holding the pledge the amount for which the pledge was given.—*Bradley v. Parks*, Sup. Ct. Ill., O. L. N., June 30, p. 389.

BANKING.—National bank; Bailment; Power of national bank to receive collateral security; Liability of the national bank for the loss of bonds deposited for such purpose; Degree of care of bank; Damages; Province of jury.—*Third Nat. Bank of Baltimore v. Boyd*, Sup. Ct. Md., Am. L. Rec., June, p. 705.

— Certificates of deposit, payable at their return to the bank, properly endorsed, are in legal effect promissory notes payable on demand, and the statute of limitations begins to run against them from their date, and no one can be held a *bona fide* purchaser of them who does not take them within a short time after their issue; It seems that two years and four months is too long; Certificates of deposit are not within Comp. Laws, sec. 7,151, exempting bank bills, notes, and other evidence of debt from the operation of the statute of limitations.—Sup. Ct. Mich., C. L. N., June 30, p. 389.

BANKRUPTCY.—The assignee takes the property of the bankrupt subject to all existing legal and equitable claims against it; Where, in an action to foreclose a mortgage, proceedings for the appointment of a receiver of the rents and profits are instituted before the adjudication of the mortgagor as a bankrupt, and there is a deficiency on the sale of the mortgaged premises, the assignee cannot claim the fund in the receiver's hands as against the mortgagee.—*Hayes v. Dickinson*, Sup. Ct. N. J., N. B. R., May 15, p. 850.

— Where counsel, employed by the bankrupt before the commencement of the proceedings in bankruptcy to carry on a suit at their own cost and retain as compensation one-half of the amount recovered, recover a large fund in such suit after the bankrupt is discharged, they are entitled to the one-half of such recovery, notwithstanding such bankruptcy and discharge; A petition filed by the bankrupt after his discharge, praying that the share of the counsel be paid to them, and the balance, after paying debts and costs of the bankruptcy, be paid to him, is one in the ordinary course of a bankrupt proceeding and not a bill in equity; Nor is a decree of the bankrupt court directing such payment the allowance of a claim against the bankrupt's estate; The proper method for reviewing such a decree is by petition; The discharge of a bankrupt does not bar the right of his assignee to recover property afterwards discovered, which the bankrupt had failed to put in his schedules; Where it appears that the discharge of the assignee has inadvertently found its way among the files of the court, the court has power to set it aside and direct the assignee to proceed with his duties; Where the assignee was substituted as plaintiff more than two years after his appointment, in a suit which was commenced in the name of the bankrupt, and recovers therein, the bankrupt cannot claim the amount of such recovery from him on the ground that the limitation provided in the bankrupt law

BANKRUPTCY—Continued.

barred his remedy at the time of his substitution; Where the assignee, in obtaining authority from the court to make a contract with counsel to prosecute a claim and to pay them for their services one-half the gross amount when recovered, suppresses facts which, if known to the court, would have induced it to withhold such authority, the contract is not binding on the court or the parties, especially where such facts were known to the attorneys themselves; But a reasonable sum for service actually performed will be allowed.—*Maybin v. Raymond*, Assignee, U. S. Cir. Ct., S. D. Miss., N. B. R., May 15, p. 353.

— A wife acquires no separate rights in a homestead which her husband has purchased in his own name in fraud of his creditors; A person taking a mortgage upon a lot claimed as a homestead, after a decree declaring the same not to be exempt as such, may be ordered summarily to release his security; No plenary suit at law or in equity is necessary.—*In re Boothroyd & Gibbs*, U. S. Dis. Ct., E. D. Mich., N. B. R., May 15, p. 368.

— The commencement of proceedings in bankruptcy does not of itself dissolve an attachment granted within the time prohibited by law; The adjudication alone has that effect, and the deed of assignment relates back and vests the title to the property in the assignee as of the date of filing the petition; There is, therefore, no time at which the lien of a judgment can attach to such property.—*In re Badenheim & Co.*, U. S. Cir. Ct., S. D. Miss., N. B. R., May 15, p. 370.

— Pledges of the bankrupt redeemed by the assignee are assets in his hands, and cannot be considered to have been redeemed for the benefit of a single creditor to the prejudice of the general creditors, whose funds have thus been diverted; Where the assignee redeems valuable pledges, he is subrogated to the rights of the pledgee until the fund is made good from the proceeds of the redeemed pledges.—*McLean et al.*, Assignees, v. Cadwalader, Ct. Com. Pleas, Philadelphia, N. B. R., May 15, p. 383.

— The law of New Hampshire—which provides that when the assets of a savings bank shall fall below 90 per cent. of the amount of deposits, the deposit account shall be reduced so as to divide the loss equitably among the depositors—is not void because the general United States bankrupt law was in force when it was enacted; Under such circumstances the condition of the bank is such as to place it among the class of cases excepted from the operation of the bankrupt law.—*Simpson v. City Savings Bank*, Sup. Ct. N. H., N. B. R., May 15, p. 385.

— Where a judgment creditor of the bankrupt proves his debt, he will be considered as having waived his lien created by that judgment on other property of the bankrupt.—*Heard v. Jones*, Sup. Ct. Ga., N. B. R., May 15, p. 402.

— When execution creditors of a bankrupt petition the bankrupt court to modify an injunction so as to allow the sheriff to sell the property, and an order is thereupon entered directing the sheriff to sell and to pay the proceeds into court, the execution creditor is bound by the order, and cannot maintain an action against the sheriff for paying the money into court in pursuance of such order, instead of paying it to them.—*O'Brien v. Weld*, Sup. Ct. U. S., N. B. R., May 15, p. 405.

— Under sec. 13 of the Revised Statutes of the United States, in a suit brought by an assignee in bankruptcy, after the passage of the act of June 22, 1874, amending the bankrupt act, to recover back money paid before June 22, 1874, in violation of sec. 5,128 of the Revised Statutes, it is sufficient for the declaration to lay the payment as made within four months of the bankruptcy, instead of two months, and to charge that the defendant had reasonable cause for believing that the payment was made in fraud of

BANKRUPTCY—Continued.

the provisions of the bankrupt law, and need not charge that the defendant *knew* that it was so made; Under the general money counts of such a declaration, evidence will not be admitted to prove any liability or implied promise, contract, or obligation arising exclusively under sec. 5,128 of the Revised Statutes, in a trial before a jury.—*Warren v. Garber*, U. S. Cir. Ct., E. D. Va., N. B. R., May 15, p. 409.

— A discharge in bankruptcy granted to one member of a partnership, after he alone had been adjudged bankrupt in a proceeding affecting him alone, to which his copartner was not a party, is not a bar to an action against him and his copartner by a partnership creditor, where the creditor shows affirmatively that, at the time of the filing of the petition, there were partnership assets as well as partnership debts.—*Crompton v. Conkling*, U. S. Dis. Ct., S. D. N. Y., N. B. R., May 15, p. 417.

— When bankrupt court will exercise summary jurisdiction to compel delivery of property; Gift of personal property by husband to wife; Proceedings by assignee to recover possession.—*In re Pierce and Whaling*, U. S. Cir. Ct., E. D. Wis., C. L. N., May 26, p. 300; *s. c.*, N. B. R., June 1, p. 449.

— Jurisdiction of bankrupt court; Homestead exemption; Does not pass to assignee; A prior agreement of the bankrupt to waive homestead exemption will not be regarded in proceedings in bankruptcy, but will be left to the determination of the state court.—*In re Miles Bass*, U. S. Cir. Ct., S. D. Ga., C. L. N., May 26, p. 303; *s. c.*, N. B. R., June 1, p. 453.

— Under the bankrupt act of 1867 the assignee might sue in the state court to recover the assets of the bankrupt, no exclusive jurisdiction being given to the courts of the United States. Whether such exclusive jurisdiction is given by the Revised Statutes, *quære*. The laws of the United States are as much the law of the land in any state as state laws are; And although, in their enforcement, exclusive jurisdiction may be given to the federal courts, yet, where such exclusive jurisdiction is not given or necessarily implied, the state courts, having competent jurisdiction in other respects, may be resorted to: In such cases the state courts do not exercise a new jurisdiction conferred upon them, but their ordinary jurisdiction derived from their constitution under the state law.—*Claffin v. Houseman, Assignee*, Sup. Ct. U. S., Am. L. Rec., June, p. 720.

— To sustain a mortgage, otherwise invalid as a preference, upon the ground of a promise to give security, made at the time of the loan, the prior promise must contemplate the giving of a specific and definite security—such an agreement as could be enforced by a bill for specific performance.—*In re The Jackson Iron Manufacturing Co.*, U. S. Dis. Ct., E. D. Mich., N. B. R., June 1, p. 438.

— A discharge duly granted under the bankrupt act cannot be impeached in a collateral action on the ground that it was obtained by fraud.—*Smith v. Ramsey*, Sup. Ct. Com. Ohio, N. B. R., June 1, p. 447.

— On an application to review the decision of the district court upon the question whether the bankrupt has made a full disclosure in obedience to an order requiring it, the petitioner must satisfy the court that the relation given by the bankrupt is such that a reasonable man would not be able to credit it, but would be satisfied of its substantial untruth.—*In re Joseph Mooney et al.*, U. S. Cir. Ct., S. D. N. Y., N. B. R., June 1, p. 456.

— Where one who has purchased a check of one bank upon another fails to present it for payment until the drawer has been adjudged a bankrupt, he is not entitled to priority of payment from the fund in the hands of the assignee, although there were sufficient funds in the hands of the drawee at the time of presentment to pay the check. Such check creates no appro-

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priation of, or lien upon, the fund in the bank, nor does it give a right of action against the drawee.—*In re Charles A. Smith*, U. S. Dis. Ct., S. D. Ohio, N. B. R., June 1, p. 459.

— A claim founded upon a judgment or decree recovered after the commencement of the proceedings in bankruptcy, without leave of the bankrupt court, cannot be proved; The liability of a guardian to his ward is not affected by his discharge in bankruptcy; Proof of claims may be filed after an order discharging the assignee has been set aside, and the assignee ordered to proceed; The filing of the petition arrests the running of the statute of limitations; So long as there is a fund to distribute, all those who had valid subsisting claims existing at the time of the commencement of the proceedings, upon making proof, will be permitted to participate in it.—*In re J. W. Maybin*, U. S. Dis. Ct., N. D. Miss., N. B. R., June 1, p. 468.

— Where a payment made by a bankrupt debtor has been recovered by his assignee in bankruptcy, the acceptance of such payment with knowledge of the debtor's insolvency is no defence to an action by the creditor against the surety for the amount thereof, where the creditor has acted in good faith towards the surety and has been reasonably diligent to save him from loss; The surety is liable for the amount of such payment, although he has in the meantime paid the balance of the indebtedness and taken up evidence therefor.—*Watson v. Poague et al.*, Sup. Ct. Iowa, N. B. R., June 1, p. 478.

— Where an insolvent, with knowledge of his condition and with intent to give his bank a preference, substitutes small notes, payable immediately, for older and larger ones held by the bank, some of which have already matured, such substitution as a condition for a further loan having been demanded by the president of the bank with knowledge of the insolvent's condition, and thereby the bank is enabled more easily to, and does, obtain judgment upon said notes, and seize and sell the insolvent's property upon executions issued thereon, such seizure and sale will be declared void, and the amount realized at the sale will be ordered paid to the assignee of such insolvent; Where a bank demands of a depositor, who has theretofore always been prompt in his payments, and who has a note overdue and others about to mature, which he has made no arrangements to meet, that he shall, as a condition of a further loan which he requires to meet a borrowed note, substitute smaller notes, payable immediately, for those then held by the bank, and also for such further loan, in order to enable it more easily to obtain judgment thereon, *held*, that the demand was made with knowledge of the applicant's insolvency.—*Loudon, Assignee, v. First Nat. Bank, etc.*, U. S. Dis. Ct., E. D. N. C., N. B. R., June 1, p. 476; *s. c.*, continued in N. B. R., June 15, p. 481.

— By an article in the constitution of a voluntary association, the seats wherein were assignable, subject to the election of the assignee as member, it was provided that "in sales of seats, for account of delinquent members, the proceeds shall be applied to the benefit of members of this board exclusive of outside creditors, unless there be a balance after the payment of members in full;" A member who was delinquent and insolvent assigned his seat, directing the assignee to sell and apply the proceeds to paying the claims upon him of members of the association; *Held*, not a preference under the bankrupt law.—*Hyde, Assignee, v. Woods*, Sup. Ct. U. S., Alb. L. J., June 2, p. 485; *s. c.*, N. B. R., June 15, p. 518.

— Where assets have come into the hands of the assignee, and he has not rendered his final account within three years from the adjudication, and the bankrupt has not been discharged or refused a discharge, the proceedings are not terminated without a discharge, within the meaning of sec. 5,106 of the Revised Statutes, so as to revive the right of action by a creditor who has proved his claim.—*Wood v. Hazen*, Sup. Ct. N. Y., N. B. R., June 15, p. 491.

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— The rate of interest and damages which the drawer of a bill is to pay *ex mora* is governed by the law of the place where the bill is drawn; If a bill is made and dated at the business domicile of the drawer, his undertaking is to pay it there in case of dishonor, though it may have been negotiated elsewhere; Damages in a case of this sort are a part of the law of the performance, and not of the execution and validity of the contract, nor of the remedy; Such a question, arising in the courts of the United States, is one of general jurisprudence, and not of local law.—*In re Glyn, Ex parte Heidelberg, Ex parte Paton*, U. S. Dis. Ct. Mass., N. B. R., June 15, p. 495.

— The validity of a discharge under the bankrupt law of 1867 cannot be impeached in a collateral action on the ground that the bankrupt fraudulently represented in his schedule that plaintiff's place of residence was unknown to him, and thereby prevented his receiving notice of the proceedings; Actual notice to the creditors is not essential to the jurisdiction of the bankrupt court, and the want of it will not invalidate the discharge where the bankrupt is found to have honestly complied with the requirements of the act.—*Rayl, Adm'r, etc., v. Lapham*, Sup. Ct. Com. Ohio, N. B. R., June 15, p. 508.

— The bankrupt law does not interfere with the debtor's power to sell or encumber his exempt property; The bankrupt act of 1867, while adopting the exemption laws of the states as to the measure and amount thereof, does not embrace local restrictions upon the debtor's estate in and dominion over exempted property.—*Farmer v. Taylor et al.*, Sup. Ct. Ga., N. B. R., June 15, p. 515.

— Where, upon a written denial by the debtor that the requisite number and amount of creditors have united in the petition, no reference to ascertain that fact is actually made, although an entry of an order therefor appears upon the minutes, the judge is not called upon, under sec. 5,021, to fix a time within which additional creditors may join. Where, under such circumstances, a supplementary petition is afterward filed, it will not be dismissed on the ground that a sufficient number and amount of creditors are not included therein, unless it is made to appear that, taking both petitions together, a sufficient number and amount have not joined.—*In re Frisbie and McHugh*, U. S. Cir. Ct., S. D. N. Y., N. B. R., June 15, p. 522.

— A distress, pursuant to the terms of a lease, made within four months of the commencement of proceedings in bankruptcy, is not fraudulent under the bankrupt law, although the bankrupt consented to it, unless collusion is shown.—*Goodwin et al. v. Sharkey et al.*, Sup. Ct. Pa., N. B. R., June 15, p. 526.

— Composition proceedings had with creditors after filing of an involuntary petition against bankrupt will not dissolve an attachment issued and levied within four months from the date of such filing, as against a creditor who took no part in such composition proceedings.—*In re Shields*, U. S. Dis. Ct., D. Iowa, C. L. J., June 15, p. 557.

— Where a sale is made, under deed of trust, of a bankrupt's property on which he resides, and the proceeds are insufficient to satisfy the debt thereby secured, so that the right of homestead is cut off, the bankruptcy court has jurisdiction to order the bankrupt to deliver possession of the property to the purchaser, without driving the latter to a suit in ejectment; An agreement to extend the time of payment of the debt so secured is not within the statute of frauds, and need not, therefore, be in writing.—*In re Betts*, U. S. Cir. Ct., E. D. Mo., C. L. J., June 15, p. 558.

— Composition; *Held*, that one member of a firm, where both the firm and the individual members thereof have been adjudicated bankrupts, may submit to the creditors of the firm and to his individual creditors a proposition of composition; That one creditor cannot object to such proceedings for

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another creditor; That an assignment made for the benefit of creditors under the state law, prior to bankruptcy proceedings, had no more effect upon those proceedings than any other act of the bankrupts (per Swayne, J.).—*Pool v. McDonald & Co.*, U. S. Cir. Ct., N. D. Ohio, C. L. N., June 16 p. 322.

—Held, that money due the consignor on account of sales made on commission by a broker is not a debt contracted in a fiduciary capacity, within the meaning of the bankrupt act; That such a debt is barred by the discharge in bankruptcy of the broker.—*Owsley & Co. v. Henry Cobia & Co.*, U. S. Cir. Ct., D. S. C., C. L. N., June 16, p. 323; *s. c.*, N. B. R., June 15, p. 489.

—Proceedings in bankruptcy in the district court of Massachusetts against the firm of Jewett & Pitcher, of which E. D. Jewett and George K. Jewett were members, constitutes no bar to proceedings in bankruptcy in the district court of Wisconsin against the firm of S. A. Jewett & Co., of which E. D. Jewett and George K. Jewett were also members.—*In re Jewett & Co.*, U. S. Cir. Ct., W. D. Wis., C. L. N., July 7, p. 345.

—The act of the circuit clerk in filing the docket transcript of a judgment is a ministerial act, and not void, though done on a non-judicial day, and the judgment creditors thereby acquired a lien upon the real estate of the judgment debtor the same as if done on any other day.—*In re R. C. Worthington*, U. S. Cir. Ct., W. D. Wis., C. L. N., July 7, p. 346.

—There is no rule of the United States district court of Maine, sitting in bankruptcy, requiring the approval of that court of public sales at auction of assets in bankrupt estates by assignees, and in such sales a purchaser of real estate situate in the state of Illinois, although made in the state of Maine, is not entitled to a certificate, or other confirmation of the sale, with the view of making his title to the land purchased conform to the methods and practice or other modes of transfer employed in the conveyance of real estate, under the rules of the courts and laws of the state of Illinois.—*In re H. O. Alden*, U. S. Dis. Ct., D. Maine, C. L. N., July 7, p. 346.

ILLS AND NOTES.—Promissory note; Accommodation endorser; Where fraud alleged, holder of accommodation paper taken as collateral security not a purchaser for value; Pleading; Singleness; Special Plea; When equivalent to the general issue.—*Cummings v. Boyd*, Sup. Ct. Pa., W. N. C., May 24, p. 66.

—Suit on premium note given to a foreign insurance corporation; The non-compliance by agent with statute of state regulating foreign corporations constitutes no defence to such suit.—*Bowser v. Lamb*, U. S. Cir. Ct., D. Ind., C. L. N., May 26, p. 300.

—Affidavit of defence law; Promissory note; A holder as collateral security not a *bona fide* purchaser for value; Effect of renewal; Fraud.—*Royer v. Keystone, etc., Bank*; *Yost v. Same*, Sup. Ct. Pa., W. N. C., May 31, pp. 86, 87.

—Promissory note; Endorsement of guarantee signed by four persons; Eight of one who advances money on the note; Each guarantor severally liable; Affidavit of defence.—*Douglass v. Second Nat. Bank*, Sup. Ct. Pa., W. N. C., July 5, p. 163.

—Promissory note; Pleadings; Infancy; Agreement to take third party as paymaster; Consideration.—*Reid v. Degener*, Sup. Ct. Ill., C. L. N., July 14, p. 353.

REQUESTS.—For educational purposes; A bequest made to a school district board and their successors forever, in trust, for the support of a library, was held valid; School district; Property rights of; Gifts to public corporations.—In the matter of the will of Lucy M. Maynard (with note), Sup. Ct. Ill., Am. L. Reg., June, p. 326; *s. c.*, C. L. N., July 14, p. 354.

BONDS, MUNICIPAL.—Bonds of county in aid of railroad; Construction of statute authorizing issue of bonds upon a vote of qualified electors of county; *Bona fide* holders; *Held*, that notice of irregularities in the vote to one of three trustees to whom deed of trust was executed by the railroad company, conveying the subscription from the county, did not operate to destroy the *bona fide* holding of the bondholders.—*Board, etc., of County of Johnson v. Thayer*, Sup. Ct. U. S., C. L. N., May 26, p. 297.

— Actions on bonds of county in aid of railroad; Construction of statute authorizing issue; *Held*, that good faith of holder in taking bonds is unavailing where there is an entire want of authority on the part of agents of county who profess to act.—*County of Dallas v. McKenzie*, Sup. Ct. U. S., C. L. N., May 26, p. 298.

— Defective execution; Presumption of lawful election; Votes cast at, presumed to be all the legal votes; What constitutes "a majority of the legal voters living in the county;" Registration under act of April 16, 1869.—*Melvin v. Lisenby* (with note), Sup. Ct. Ill., C. L. J., July 6, p. 15.

— In aid of railway; The provisions of the Missouri constitution as to consent of voters to issue of bonds *held* to be not retroactive; Charter power of railroad to receive subscriptions passes into the new condition of its existence, which the company assumed under a consolidation with another railroad company, although the latter was a foreign corporation.—*Scotland County v. Thomas*, Sup. Ct. U. S., C. L. J., July 13, p. 33.

— Bonds in aid of railroads, issued without authority of law, are void in whosoever hands they may be.—*Middleport v. Treasurer of Iroquois county*, Sup. Ct. Ill., C. L. N., July 14, p. 353.

BONDS, OFFICIAL.—A superintendent of Indian affairs was appointed to succeed himself, and ordered to execute a new bond to the government in place of an old bond, for the careful discharge of his duties, and faithful accounting for all public moneys, and he was also ordered to transfer to himself the balance of all public moneys, etc., on hand at the date of the execution of the new bond and to account for the same under the new bond; *Held*, that the administrator of the deceased superintendent and the securities on the old bond were not liable to the government for such balance.—*United States v. Earhart*, U. S. Cir. Ct., D. Oreg., C. L. N., May 26, p. 304.

— Suit on; Duty of sheriff in taking a replevin bond; *Held*, that it is not a question of good faith, but whether sheriff has acted with judgment, and observed the requirements of the law; That he will not be allowed to substitute his own belief of what is right for such requirements.—*People v. Gore*, Sup. Ct. Ill., C. L. N., July 7, p. 346.

CARRIERS.—Breach of contract by railroad company to furnish a special train on Sunday; *Held*, that the action was founded on contract and not in tort for a breach of duty as carrier, as the defendant was under no obligation to carry persons on the road on Sunday, and that the plaintiff was only entitled to recover such damages as naturally and fairly resulted from the breach, and no damages for annoyance, vexation, mental distress, and sense of wrong.—*Walsh v. Chicago, etc., R. W. Co.*, Sup. Ct. Wis., C. L. N., June 9, p. 315.

— A delivery by a railroad of a box to a wrong person is not conclusively a want of ordinary care, where the directions on the box were such as to mislead the company. The question should have been sent to the jury.—*Lake Shore, etc., R. R. Co. v. Hodoff*, Sup. Ct. Pa., C. L. N., June 16, p. 327.

— T., one of the firm of T. & R., delivered to an express company at Greensboro, N. C., goods consigned to the firm of T. & R., at Columbia, S. C., at the time informing the company that the goods were the property of D. Subsequently, without the consent of D., the express company delivered the goods at Greensboro upon the order of T.; *Held*, that the company were liable to D. for the value of the goods.—*Southern Express Co. v. Dixon*, Sup. Ct. U. S., Alb. L. J., June 23, p. 491.

CONSTITUTIONAL LAW.—Oyster fisheries of Virginia; The beds of all tide-waters, and the fish in them, within jurisdiction of a state, are the property of the state, unless granted away, subject to the paramount right of navigation; United States Constitution, Art. IV., sec. 1, considered; Right of a state to direct how its common property is to be used.—*McCready v. Virginia*, Sup. Ct. U. S., C. L. N., May 26, p. 299; *s. c.*, Alb. L. J., May 26, p. 413.

— Power of the legislature to impose a liability on a municipal corporation, without its assent, denied.—*Hoagland v. City of Sacramento* (with note), Sup. Ct. Cal., C. L. J., June 1, p. 521.

— Act of 1873, in relation to erecting court houses, unconstitutional; Repeal of statute by implication.—*Devine v. Commissioners*, Sup. Ct. Ill., C. L. N., June 30, p. 337.

— The dissenting opinion in the Granger Cases.—Chicago, etc., R. R. Co. v. Cutts, and five other railroad cases, Sup. Ct. U. S., C. L. N., July 7, p. 345.

CONTEMPT.—Insulting or disrespectful language used by an attorney to the judge before whom a matter is pending is a contempt, although not used in open court, but addressed in a letter to the judge.—*In re Prior*, Sup. Ct. Ks., Am. L. Reg., June, p. 351.

CONTRACT.—Personal services; Payment for, conditioned on sale of realty; Failure of sale through the acts of the vendor; Burden of proof.—*Norris v. Maitland*, Sup. Ct. Pa., W. N. C., May 24, p. 62.

— Statute of frauds; Agreement by one to retain money due from him to another, for the payment of creditor of latter, is not within the statute; Effect of the promise; Rules to ascertain the application of the statute; Agreement to extend payment as a consideration for the promise.—*Calkins v. Chandler*, Sup. Ct. Mich., C. L. J., May 25, p. 490.

— Agreement between attorneys; How far binding upon clients; Deed between husband and wife; Where the wife, in 1866, made a deed of her real estate directly to her husband, *held*, that the same was absolutely void at law, and, therefore, it will not be enforced in equity; Cloud on title; Jurisdiction to remove; Where a deed is made by a wife directly to her husband, but there is nothing upon its face to show the relation between them, such a deed, though void, is a cloud upon title, as evidence *aliunde* is necessary to establish its invalidity.—*Brooks v. Kearns*, Sup. Ct. Ill., C. L. N., July 7, p. 348.

— Where the clerk of a voluntary musical association made a contract to furnish a certain number of musicians for a certain time, and did so furnish them, *held*, that he was the proper person to bring suit for the services performed by such musicians.—*Corbett v. Schumacher*, Sup. Ct. Ill., C. L. N., July 7, p. 352.

— Assignment, by endorsement to plaintiff, of an instrument of writing in the form of a promissory note, but with additional stipulations as to compounding interest, and waiver of all exceptions under execution, exemption, homestead, and stay laws, and providing for the payment of attorney's fees in case of suit; *Held*, that the instrument was not negotiable, because of the stipulation as to attorney's fees; That defendants, the maker, and endorser, were not jointly liable, and that the assignor (endorser) could only be held after plaintiff had exhausted his remedy against the maker.—*Lamstag v. Conly et al.*, Sup. Ct. Mo., C. L. J., July 13, p. 29.

CORPORATIONS.—The relations between a corporation and its promoters or projectors determined; Rescission of contract of sale upon bill filed by company against promoters, who had sold certain leasehold property to the company, on the ground of misrepresentation made in prospectus, and the concealment of the price paid by the vendors.—*New Sombrero Phosphate Co. v. Erlanger* (with note), Ct. of App. (Eng.), C. L. J., June 1, p. 510.

CORPORATIONS—*Continued.*

— An amendment to its charter authorized the corporation to extend its road to another point; *Held*, that such amendment did not continue its corporate existence beyond the period mentioned in the original charter.—*St. Clair, etc., Co. v. People*, Sup. Ct. Ill., C. L. N., July 7, p. 347.

COUNTIES.—*Held*, that an original action cannot be maintained against a county upon an account which is required to be submitted to the board of commissioners for examination and allowance; That, in these cases, the jurisdiction of the district court is not original, but appellate merely.—*Brown v. Otoe County*, Sup. Ct. Neb., C. L. J., July 6, p. 6.

COURTS.—Federal; Removal of causes to, under act of March 3, 1875; A motion to remove made in state court on the redocketing of a cause under a mandate from the supreme court of the state is made in apt time.—*Petillon v. Noble*, U. S. Cir. Ct., N. D. Ill., C. L. N., June 9, p. 314; *s. c.*, Alb. L. J., June 16, p. 472.

— Removal of cause from state to federal court; The defendant filed its application and bond for the removal of the cause from the state to the federal court; After approving the bond the state court permitted the plaintiff to enter a nonsuit; *Held* that, after the filing of the proper application and bond, the state court could proceed no further in the cause, and that any attempt in that direction was *coram non judice*, and that, consequently, the nonsuit was improperly granted.—*Berry v. Chicago, etc., R. R. Co.*, Sup. Ct. Mo., C. L. J., July 13, p. 29.

— Removal of cause from state to federal court; *Held*, that merely filing petition and bond for transfer does not operate as a removal of the cause, or oust the state court of its jurisdiction; That an amended petition and bond can be filed as a matter of right, if exercised at the proper time; That the state court has power, on filing petition for removal of cause, to enquire into the truth of the facts alleged in the petition for a change of forum; Upon rehearing, *held*, that an affidavit for transfer of cause to a federal court, which merely states that certain parties to the suit are non-residents of the state where suit is brought, but fails to state that they are residents of some other state, is insufficient; Such affidavit should show affirmatively the citizenship of the parties, and that they are residents of some other state of the United States; *Held*, that an affidavit that parties were non-residents on the 6th day of April, 1874, does not prove that they were such non-residents on the 19th day of May, 1875.—*Delaware, etc., Co. v. Davenport, etc., Co.*, Sup. Ct. Iowa, C. L. N., July 14, p. 354.

CRIMINAL LAW.—Indictment for having counterfeit coin in possession, knowing the same to be false; Under sec. 13 of the Revised Statutes the repeal of an act defining a crime and its punishment does not prevent the prosecution and conviction of a party for a prior violation thereof; Repeal of a statute by the enactment of another.—*United States v. Barr*, U. S. Dis. Ct., D. Oreg., C. L. N., June 2, p. 308.

— Upon an indictment for forging the election returns of the township of A, a plea that the defendants had been tried and acquitted of forging the election returns of the township of B, in the same county, at the same election, is not good upon demurrer, even though there is an allegation in the plea that the offences were one and the same; Although a demurrer to a plea admits the facts pleaded, and refers their legal sufficiency to the court, it does not admit allegations of the legal effect of the facts therein pleaded.—*Commonwealth v. Trimmer*, Sup. Ct. Pa., W. N. C., June 7, p. 101.

— Holding of two Courts of Oyer and Terminer at the same time; Trial of case in which the jury was sworn upon the last day of the term; Adjournment until five days thereafter; Evidence; What admissible to explain motives of prisoners; Testimony of accomplice; Corroboration of, as to

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- facts not directly connecting the prisoners with the crime; Degree of credit to be given to testimony of accomplice.—*Carroll et al. v. Commonwealth*, Sup. Ct. Pa., W. N. C., June 14, p. 109.
- Indictment; Sufficiency of; Evidence; Testimony of detective; What degree of credit to be given to; Character of evidence admissible to prove motive for crime; Connection of prisoner with criminal organization; Selection of names of grand jurors; Finding of facts by court below; When not set aside.—*Campbell v. Commonwealth*, Sup. Ct. Pa., W. N. C., June 14, p. 114.
- Cost incurred by special agent of commonwealth in pursuing criminal under requisition; Whether county liable for; Unsuccessful attempts to arrest a fugitive from justice who has taken refuge in other states; Criminal procedure act of March 31, 1860, sec. 1.—*Stockman v. County of Bedford*, Sup. Ct. Pa., W. N. C., June 14, p. 120.
- Homicide; Murder in the first degree; Practice; Trial and its incidents; Charge of court; Misapprehension by the jury; Answering points.—*Pistorius v. Commonwealth*, Sup. Ct. Pa., W. N. C., June 21, p. 129.
- Cumulative sentence; Specification of time of beginning of each term necessary.—*In re Dennis Jackson*, Sup. Ct. Dis. Col., C. L. N., June 23, p. 331.
- Murder in the first degree; Circumstantial evidence; Custody of jury wheel by commissioners; When sufficient; Act of April 10, 1867; Sealing of the wheel; Act of April 14, 1884; Use of one seal by the sheriff and jury commissioners; Juror; When competent; Opinion of prisoner's guilt; When of such a character as to disqualify juror; Practice; Assignments of error unsupported by bills of exception; Error in charge; When not sufficient to reverse.—*Curley v. Commonwealth*, Sup. Ct. Pa., W. N. C., June 28, p. 141.
- Declarations held to be inadmissible not being of the *res gestæ*; What declarations are part of the *res gestæ*; When murder is presumed; Definition of murder in the first, and murder in the second, degree.—*State v. Evans* (with note), Sup. Ct. Mo., C. L. J., July 6, p. 12.
- Criminal information against a justice of the peace sustained where the female was under the age of consent; Evidence to prove the misdemeanor; Proof of guilty knowledge.—*Bunker v. People*, Sup. Ct. Mich., C. L. J., July 13, p. 31.
- Indictment for living in open and notorious fornication under act June 10, 1852; Repeal of former act requiring crimes to be defined in statutes; A decree of divorce granted in Utah, where court had no jurisdiction on account of want of residence of parties, is null and void, and is, notwithstanding Art. IV, sec. 1, of the Constitution of the United States, not entitled to any credit, where the decree upon its face shows that the court rendering it had no jurisdiction.—*Hood v. State*, Sup. Ct. Ind., C. L. J., July 13, p. 35.
- DEBTOR AND CREDITOR.—Arrest under act of July 12, 1842; Bond for appearance at hearing; Condition fulfilled by appearance of defendant; New bond requisite if hearing adjourned.—*Noble v. Long*, Sup. Ct. Pa., W. N. C., May 24, p. 61.
- DEVISE.—A testator devised his plantation to three of his children, A, B, and C, their heirs and assigns, and in case either should die without leaving lawful issue to survive them, then the share of such child to be equally divided between the survivors and a fourth child of the testator, their heirs and assigns, share and share alike. A executed to B a deed purporting to convey the whole plantation; Afterwards A died, leaving issue; Held that each of the three children took a base fee in the land, with an executory devise

DEVISE—*Continued.*

over to their issue, in the nature of a cross-remainder, and that, as the deed of A conveyed his whole interest in the land, no estate therein descended to his issue.—*Broomall v. Broomall*, Sup. Ct. Pa., W. N. C., May 24, p. 65.

DISTRIBUTION.—A married woman, the holder of a policy of insurance on her husband's life, payable generally to her, her executors, administrators, and assigns, died intestate, in the life-time of her husband, leaving two children; Subsequently the husband died: *Held* (reversing the decree of the court below), that the husband's estate was entitled to distribution to the extent of one-third of the proceeds of the policy.—*Deginther's App.; Haas' Ex'rs App.*, Sup. Ct. Pa., W. N. C., June 7, p. 95.

EASEMENT.—An easement in light and air to be supplied from the premises of another cannot be acquired by mere use and prescription, but may be granted by deed or created by contract; The English doctrine not approved.—*Stein v. Hauck*, Sup. Ct. Ind., C. L. J., June 22, p. 581.

EMINENT DOMAIN.—Land owner has constitutional right to insist upon payment for his property as a condition precedent to the condemnation and taking of the same for railroad uses; Where the railroad corporation is insolvent, and the damages assessed to property are not paid, an injunction will be issued restraining the operation of the road over the property; Presumptions as to waiver of his rights by the landlord will not be indulged in.—*Evans v. Missouri, etc.*, R. R. Co., Sup. Ct. Mo., C. L. J., July 13, p. 39.

EQUITY PRACTICE.—Bill for an accounting; The settled practice of this court is that, where accounts involve large sums of money, and the testimony as to rights of the parties is conflicting, the cause must be referred to a master to state the accounts.—*Quale v. Guild*, Sup. Ct. Ill., C. L. N., July 14, p. 353.

— *Held*, that decree of a court of equity in Illinois cannot reach property of defendants situated in Colorado; *Held*, that after suits are commenced in one of the states it is inconsistent with inter-state harmony that their prosecution should be controlled by the courts of another state.—*Harris et al. v. Pullman et al.*, Sup. Ct. Ill., C. L. N., July 14, p. 356.

EXECUTION.—Supplemental proceedings; *Held*, that in a proper case the court would compel a judgment debtor to execute and deliver to the receiver an assignment of his (the debtor's) interest in letters patent.—*Randall v. Wyckoff*, Sup. Ct. N. Y., C. L. N., June 30, p. 342.

FENCES.—Hedge; Partition fence; Occupancy in severalty; Hedges planted upon the division line between premises do not attain the character of a partition fence, so as to impress upon the respective owners the character of occupancy in severalty, until they become sufficient to turn stock; So long as stock can pass at will from the premises of one to those of the other, adjoining proprietors are occupying in common without a partition fence; Adjoining premises; Throwing to common; An owner of premises occupied as above may throw any portion of the same, not less than twenty feet in width, to common, upon giving six months' notice to the adjoining owner.—*Miner v. Bennett*, Sup. Ct. Iowa, West. Jur., June, p. 350.

GARNISHMENT.—Garnishees not chargeable for unpaid balance not due under statutes of Minnesota.—*Wheeler v. Day*, Sup. Ct. Minn., C. L. N., June 23, p. 331.

GUARANTY.—Railroad corporation may, upon a sufficient consideration, make a valid contract guaranteeing the payment of the bonds of another corporation; And the lease to the former of the road of the latter is such a consideration; Conditional contract.—*Low et al. v. California, etc., Co.* (with note), Sup. Ct. Cal., C. L. J., May 25, p. 487.

HABEAS CORPUS.—In this kind of proceeding the law does not allow the authority of the judge by whom the court was held and the warrant issued

HABEAS CORPUS—Continued.

to be disputed in a summary manner, where that court had jurisdiction of the case and the party, and the warrant was sufficient to justify the officer, and the prisoner had no special privilege or exemption, saving him from imprisonment.—*Sheehan's Case*, Sup. Jud. Ct. Mass., C. L. J., June 1, p. 524.

HIGHWAYS.—Streets in the city of Philadelphia; Proper procedure for opening; Acts of April 21, 1855, May 14, 1874, and June 16, 1871, construed.—*Mitcheson's App.*; *In re Jackson Street*, Sup. Ct. Pa., W. N. C., June 7, p. 98.

— Opening of street; Act of March 2, 1873; Interpretation of; Mandamus to commissioner of highways; Demurrer.—*Commonwealth v. Dickinson*, Sup. Ct. Pa., W. N. C., June 21, p. 132.

HOMESTEAD.—Under a homestead exemption of forty acres, if outside of a town, or, if inside, of a lot worth not more than \$1,500, it is held that a subsisting right to the forty-acre exemption is not changed by the extension of municipal limits to include the land.—*Barber v. Roraback*, Sup. Ct. Mich., Alb. L. J., June 23, p. 497.

HUSBAND AND WIFE.—Married women; Separate acknowledgment of wife; Magistrate's certificate, when conclusive; Form of certificate; Essentials thereof; United States revenue stamp acts; What is a sufficient copy of a lost instrument within the act of June 13, 1874.—*Miller v. Wentworth*, Sup. Ct. Pa., W. N. C., May 31, p. 82.

— Marriage; Under the laws of Minnesota, marriage is a civil contract, of which consent is the essence. A mutual agreement between competent parties, *per verba de presenti*, to take each other for husband and wife, deliberately made and acted upon by living together professedly in that relation, is sufficient without any formal solemnization or ceremony to give it validity in law; Marriage inferable from circumstances; Direct proof not required; The policy of the law favors matrimony and legitimacy rather than concubinage and bastardy; Nature of testimony to justify presumption of marriage; Practice in a proceeding of bastardy.—*State v. Worthingham*, Sup. Ct. Minn., C. L. N., June 16, p. 823.

— Criminal marriage; The act of 1868 (Pasc. Dig. 2,016), making it a felony for a white person to marry a negro, held to be repealed by implication. "The law in question was simply one of a system brought into existence by the institution of slavery and designed for its support, and which, like all other laws on the subject, disappeared along with that institution."—*State v. Webb* (with note), Dist. Ct. First Jud. Dist. Tex., C. L. J., June 22, p. 588.

— Building associations; Incapacity of wife to become a member, or to bind herself for premiums, fines, or dues; Act of April 12, 1869; Not applicable to married women; Mortgage to secure money borrowed for the improvement of wife's separate estate; Right of recovery thereon.—*Wolbach v. Lehigh Building Ass'n*, Sup. Ct. Pa., W. N. C., July 5, p. 157.

INSANE PERSONS.—Inquisition of insanity upon motion for new trial of defendant, one of the grounds of which was that, at the time of trial of defendant upon an indictment of perjury, he was of unsound mind, and, therefore, unable to properly plead to the charge or conduct his defense; Charge of court to the effect that the burden of proof was not on the government, but that no man should be prosecuted of whose sanity there is a reasonable doubt.—*United States v. Lancaster*, U. S. Dist. Ct., N. D. Ill., C. L. N., June 2, p. 307.

— Where persons apparently of sound mind, and not known by the adverse party to be otherwise, enter into a contract which is fair and *bona fide*, and which is executed and completed, and the property which is the subject of the contract cannot be restored so as to put the parties in *statu quo*, such contract cannot be set aside, either by the alleged lunatic or those who represent him.—*Scanlan v. Cobb*, Sup. Ct. Ill., C. L. N., June 30, p. 340.



INJUNCTION.—When not granted; Threatened trespass: Removal of boundary fence.—Minnig's App., Sup. Ct. Pa., W. N. C., June 7, p. 99.

INSURANCE, FIRE.—In the absence of a statute requiring a contract of insurance to be in writing, a parol contract for insurance is valid.—Relief Fire Ins. Co. v. Shaw, Sup. Ct. U. S., Alb. L. J., June 16, p. 474.

INSURANCE, LIFE.—The sale and assignment of a life policy, outstanding and valid, and containing no prohibition of such alienation, is good in Rhode Island, though made to one who has no interest in the life insured, provided such sale and assignment is a *bona fide* business transaction, and not a device to evade the law.—Clark v. Allen, Sup. Ct. R. I., Alb. L. J., May 26, p. 409.

— An agreement by which one life insurance company transfers to another life insurance company all of its assets of whatsoever name and nature, in consideration of the latter company's undertaking to reinsure all the risks, and to assume and pay all the debts and liabilities of the former company, is *ultra vires* and void, although the vendor company may be authorized by its charter to reinsure its risks; If the result of such a transaction is to induce the vendor company to cease to use its franchises, and to produce practical insolvency, policy-holders and creditors in Tennessee may attach property of the corporation in that state by bill in chancery, and subject the same to the satisfaction of their debts; Extent of recovery by policy-holder; Premiums paid to the conveyee company; Loan-note; Forfeiture for non-payment of interest in advance; Published rule; Temporary extension.—Smith v. St. Louis Mutual Life Ins. Co., Chan. Ct. Nashville, Tenn., C. L. J., June 15, p. 563.

— Forfeiture of policy for non-payment of premium; Parol agreement of agent to give notice; When ratified by acts of the company; Failure to notify; Estoppel.—Globe, etc., Ins. Co. v. Johns, Ex'r, etc., Sup. Ct. Pa., W. N. C., June 21, p. 131.

— A person who has no interest in another's life cannot purchase or take by assignment an insurance policy on such life; Such a thing would be clearly against public policy, and is not authorized by law.—Missouri, etc., Ins. Co. v. Sturges, Sup. Ct. Ks., Alb. L. J., June 23, p. 496.

— Life insurance; Not a contract of indemnity merely; Insurable interest; Policy on life of husband and wife for benefit of survivor; Subsequent divorce does not impair the policy; Witnesses in federal courts; Attorney.—Connecticut Life Ins. Co. v. Schaefer (with note), Sup. Ct. U. S., Am. L. Reg., July, p. 392.

INTERNAL REVENUE.—A trust company which merely invests its capital in mortgage securities and sells those securities with its own guarantee, *held* not to be a banker either in the ordinary acceptance of the word or under the United States revenue laws.—Selden, Collector, v. Equitable Trust Co., Sup. Ct. U. S., Alb. L. J., July 7, p. 16.

JUDGMENT.—Judgment; Attachment execution served on defendant by creditor of plaintiff; Right of plaintiff and defendant to open judgment by agreement; Right of attaching creditor to intervene; Practice.—Gallagher v. Miller, Sup. Ct. Pa., W. N. C., July 5, p. 165.

JUSTICE OF THE PEACE.—*Held*, that it was the duty of the appealing party to perfect his appeal by carrying up the papers in the case, and paying the appeal fees; Failing to do this, after service of a rule on him to do so, his appeal was properly dismissed.—Garrity v. Bash, Sup. Ct. Ill., C. L. N., June 30, p. 344.

LEGACIES.—Specific; When realty will be charged with payment; Not void by reason of charitable devises failing.—Davis' Appeal, Sup. Ct. Pa., C. L. N., June 16, p. 326.

LIQUOR SELLING.—Liquor law of 1873; Pleading; Nature of injuries must be alleged in petition; Exemplary damages; The 12th section of the act of February 27, 1873, so far as it authorizes the assessment of exemplary damages in civil suits for acts which the state also provides may be punished by a criminal prosecution, is in violation of the Bill of Rights, which declares that no person shall be put in jeopardy twice for the same offence, and is, therefore, unconstitutional and void.—*Koerner v. Oberly*, Sup. Ct. Ind., C. L. J., July 13, p. 30.

MALICIOUS PROSECUTION.—Acting by advice of counsel as a justification; Defendant need not show by proof that counsel was learned in the law; It will be presumed that an attorney licensed by the supreme court to practice law was competent to give legal advice.—*Horn v. Sullivan*, Sup. Ct. Ill., C. L. N., July 7, p. 352.

MECHANIC'S LIEN.—Under the legislation of Iowa, mechanics and material men are entitled to a lien on railways for their work and labor, which lien dates from the commencement of the building of the railway, and takes priority over a mortgage executed after the commencement of the works but before the completion of the same.—*Taylor v. Burlington, etc., R. W. Co.* (with note), U. S. Cir. Ct., D. Iowa, C. L. J., June 8, p. 536; *s. c.*, C. L. N., June 23, p. 329; *s. c.*, West. Jur., June, p. 387.

— Upon the facts, the sellers of wind engines and pumps delivered to the railroad company *held*, under the legislation of Iowa, not entitled to a mechanic's lien; Effect of taking collateral security in defeating the right to a mechanic's lien.—*Taylor v. Burlington, etc., R. W. Co.*, U. S. Cir. Ct., D. Iowa, C. L. J., June 8, p. 535; *s. c.*, C. L. N., June 23, p. 329; *s. c.*, West. Jur., June, p. 346.

MORTGAGES.—Equitable rights of a wife in the mortgaged estate of her husband, where the interest of the latter will sell for enough to satisfy the debt; The wife's inchoate right in her husband's lands contingent upon his death, or the extinguishment of his title by judicial sale, will be properly guarded and protected by the courts.—*The Thames, etc., Co. v. Julian*, U. S. Cir. Ct., D. Ind., C. L. J., June 8, p. 534.

— The owner of premises executed a mortgage on the same, and thereafter conveyed them to a grantee, who did not assume the payment thereof. Through several mesne conveyances, the grantees in none of which assumed the payment of the mortgage, the property was conveyed to defendant. In the deed to defendant was a clause whereby she assumed payment of the mortgage. *Held*, that the holder of the mortgage was not entitled to the benefit of defendant's agreement, and she was not liable for a deficiency upon a sale under the foreclosure of the mortgage.—*Vrooman v. Turner*, Ct. App. N. Y., Alb. L. J., June 9, p. 454.

— Chattel mortgage; A mortgage, made to secure debts maturing at a future day, which conveys a stock of goods in a particular store, and any other goods which may from time to time, during the existence of the mortgage, be purchased by the grantors and put into said store to replace any part of said stock which may have been disposed of, or to increase and enlarge the stock now on hand, is void *per se*.—*Phelps v. Murray*, Chan. Ct. Nashville, Tenn., C. L. J., June 22, p. 583.

— Ejectment against the assignee of a mortgagee; The assignee of a mortgage, holding the note secured thereby, was, after condition broken, found in possession of the mortgaged premises, and the heirs and assigns of the mortgagor thereupon brought ejectment to dispossess him. *Held*, that the plaintiffs could not recover; Recitals showing jurisdiction; Statute of Limitations; Exceptions as to females.—*Kilgour v. Gockley*, Sup. Ct. Ill., C. L. N., June 30, p. 338.

— Sale under power in trust deed; Place of sale; North door of court house; Construction of deed.—*Alden v. Goldie*, Sup. Ct. Ill., C. L. N., June 30, p. 338.

MORTGAGES—Continued.

— Where a decree of foreclosure under a deed of trust conveying a railroad, etc., to secure certain bonds has been obtained in the name of the trustee for all the bondholders, a court of equity will not, at the instance of certain bondholders, direct the trustee to execute the decree and sell the road at once, but will leave the trustee to the exercise of his discretion; The remedy of the bondholders in such case is to apply to have the trustee removed, and in that way get a trustee who will execute their wishes.—*Farmer's Loan and Trust Co. v. Central R. R. Co.*, U. S. Cir. Ct., D. Iowa, West. Jur., July, p. 428.

MUNICIPAL CORPORATIONS.—Liability for damages resulting from defective pavement of highways under its charge; Juror; Interest of citizens or taxpayers not ordinarily sufficient to disqualify.—*City of Omaha v. Olmstead*, Sup. Ct. Neb., Am. L. Reg., June, p. 356.

— The board of public works had no authority to enter into a contract for paving a sidewalk on one of the streets around the capitol, which was provided for in sundry civil appropriation act of March 8, 1873, 17 Statutes at Large.—*Washington, etc., Co. v. District of Columbia*, Sup. Ct. Dist. Col., C. L. N., June 2, p. 308.

— Assessments for expenses of improvements; An ordinance providing that an improvement shall be paid *wholly* by special assessment is not repugnant to § 24, Art. 9, ch. 24, Rev. Stat.; An assessment to pay for work already done in good faith by the corporate authority, or under its direction, in anticipation of the special assessment, is valid; It is no defence to an assessment that the contract for the work was not performed according to its terms; The proper authorities must decide upon, and, if they accept the work, the acceptance, in the absence of fraud, is conclusive.—*Rickets v. Hyde Park*, Sup. Ct. Ill., C. L. N., June 30, p. 844.

— Authority to subscribe a certain sum to the stock of a railroad is not an authority to sell bonds at a discount to a larger amount, so as to raise that sum.—*Davies County Court v. Howard*, Ct. App. Ky., Am. L. Reg., July, p. 429.

— Under the general incorporation law there is no such office as city marshal; by that law provision is made for the election of certain officers only, and, until the city council shall so provide, there is no officer with like powers, such as the city marshal had under the special charter of the city; *Held*, that the office to which relator claims he was elected, under the special charter of the city (city marshal), was determined and ceased by the organization of the city under the general incorporation law.—*People v. Galesburg*, Sup. Ct. Ill., C. L. N., July 7, p. 348.

NEGLECT.—The liability of a township for an accident caused by the unsafe condition of a road is not avoided by the fact that the road had been constructed or repaired by a contractor, under contract awarded in accordance with the act of January 19, 1860.—*Township v. Scholly*, Sup. Ct. Pa., W. N. C., June 21, p. 184.

— Contributory negligence; Railroad company; Crossings at grade; When questions of negligence should not be submitted to the jury.—*Central R. R. v. Feller et al.*, Sup. Ct. Pa., W. N. C., July 5, p. 160.

NUISANCE.—A general grant of power to a city council "to declare what shall be a nuisance, and to prevent, remove, or abate the same," will not authorize the council to declare anything a nuisance which is not such at common law, or has not been declared such by statute; Shade trees standing just within the curbing of the sidewalk on a street do not constitute a nuisance, where they are no obstruction to the travel along such street; and an owner of the abutting lot may enjoin the city authorities from cutting down such trees, although the city council may have declared the same a nuisance and directed their abatement as such.—*Everett v. Council Bluffs*, Sup. Ct. Iowa, West. Jur., July, p. 416.

PARTNERSHIP.—Agreement to indemnify retiring partner against existing contracts of the firm; Presumption as to knowledge of liquidating partner with regard to such contracts; Evidence; Proof of contents of letters; What not admissible; Parol proof corroborative and explanatory of matters of record.—*Farrington v. Woodward*, Sup. Ct. Pa., W. N. C., June 28, p. 146.

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— Infringement; Sale more than two years prior to application for patent; Abandonment.—*The Consolidated, etc., Co. v. Wright*, Sup. Ct. U. S., C. L. N., June 9, p. 318.

— A patent will not be granted which has previously been described in an English patent.—In the matter of *McCloskey's App.*, Sup. Ct., D. Col., C. L. N., June 9, p. 318.

PRACTICE.—Reference of action involving claim for legal services; Decision of the general term granting or refusing a discretionary order held not to be appealable to the court of appeals.—*Martin v. Windsor Hotel Co.*, Ct. App. N. Y., Alb. L. J., June 23, p. 495.

PRINCIPAL AND AGENT.—Broker employed by A to effect an exchange of properties with B cannot recover commissions from B, even on an express promise by B after the exchange.—*Lynch v. Fallon* (with note), Sup. Ct. R. I., Am. L. Reg., June, p. 331.

— Ratification by principal must be with knowledge of the facts as they really are; Agent's good faith does not excuse negligence; Agent to loan money taking insufficient security; Principal not obliged to accept the security at his peril or reject it at once.—*Owensboro Savings Bank v. Western Bank*, Ct. App. Ky., Am. L. Reg., June, p. 344.

— If an insurance company discontinues its insurance business, and notifies the public to that effect, a contract made by it with a person, as agent, to effect insurances, and for which he has paid the company a sum in advance, to be taken out in policies thereafter to be obtained by him, will be held rescinded, and the person acting as agent can sue the company for the balance of the sum so paid in advance to it, after deducting whatever insurances that may have been effected by him.—*Seipel v. International, etc., Co.*, Sup. Ct. Pa., C. L. N., June 16, p. 327.

RAILROADS.—Liens of employes for services; Resolutions of January 21, 1843; Act of April 4, 1862; Meaning of words "contractors, laborers, and workmen;" Civil engineers not within.—*Pennsylvania, etc., v. Luffer*, Sup. Ct. Pa., W. N. C., May 31, p. 77.

— Liability of railroad company for injuries sustained by a passenger at the hands of a fellow-passenger; Exemplary damages; Duty of a conductor to protect passengers from insult and injury; Practice as to instructions to jury.—*New Orleans, etc., R. R. v. Burke*, Sup. Ct. Miss., C. L. J., June 8, p. 539.

— An employe of a railroad company, working in the machine and repair shops of such company, is not so engaged in operating a railway as that he can under Code, § 1,307, recover for an injury resulting to him by the negligence of a co-employe; Instructions; Issues fully stated; Error; Resumption of prejudice arising therefrom.—*Potter v. C. R. J. & P. R. R. Co.*, Sup. Ct. Iowa, West. Jur., July, p. 418.

REAL PROPERTY.—The several states of the Union possess the power to regulate the tenure of real property within their limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners; *Held*, that, under the laws of the state of New York, a devise of lands there situated to the United States is void.—*United States v. Fox*, Sup. Ct. U. S., Alb. L. J., May 26, p. 412.

RECEIVER.—Appointment of railroad receiver; A court of equity will not appoint a receiver of a railroad merely upon a showing that there has been a default in the payment of interest, secured by a mortgage of the properties and income of the company, that upon such default the trustees under the mortgage were entitled to immediate possession, that they have demanded possession, and that the same has been refused; It is necessary, in addition to this, to show that ultimate loss will happen to the beneficiaries under the mortgage by permitting the property to remain in the hands of its owners until final decree and sale, if such decree and sale be made; The facts in this case examined and *held* not to exhibit such danger to the bondholders as will warrant the appointment of a receiver; The case of *Williamson v. New Albany R. R. Co.*, 1 Bissell, 198, followed.—*Union Trust Co. v. St. Louis, etc., R. R.*, U. S. Cir. Ct., E. D. Mo., C. L. J., June 22, p. 585.

REPLEVIN.—In the statutory substitute for replevin the petition need not contain all the allegations required in the affidavit; In such proceeding, under a general denial of title in plaintiff, defendant may justify under legal process against the true owners; Fraudulent conveyances; Practical verdict.—*Bosse v. Thomas*, St. Louis Ct. App., C. L. J., May 25, p. 485.

RIPARIAN RIGHTS.—Title to land under water in England and America; Rule of the federal courts as to what are navigable waters distinguished from the English rule; The rule adopted in Iowa; Power of public authorities there to build wharves and levees on the banks of the Mississippi below high water determined; Railways in streets; Rights of abutting owners.—*Barney v. City of Keokuk* (with note), Sup. Ct. U. S., C. L. J., May 25, p. 491.

SALES.—Vendors held liable to purchasers for sale of counterfeit negotiable bonds, though the former were unaware of the worthlessness of the bonds at the time of sale, which was completed by a telegram accepting plaintiff's offer as to price; *Held*, that contract was not modified by a letter subsequently written by vendors and received by purchasers and proposing to treat the sale as one without recourse, the terms of which letter were under the facts not accepted by purchasers.—*Utley et al. v. Donaldson et al.*, Sup. Ct. U. S., Alb. L. J., June 9, p. 448.

— Vendor and vendee; Sale of chattels; Warranty; Eviction; Misrepresentation of title; Sale of patent.—*Krumbhaar v. Birch*, Sup. Ct. Pa., W. N. C., June 28, p. 144.

TAXES.—The provisions of the act of July 1, 1862, so far as they impose a tax *in personam*, impose it only on the executor or trustee, and not on the legatee or *cestui que trust*.—*United States v. Allen*, U. S. Dis. Ct., S. D. N. Y., C. L. N., June 23, p. 330.

— Tax sale; Two sales same day; One valid; Where land was sold twice on the same day for the delinquent taxes of different years, and the owner redeemed from the first sale, supposing it was the only sale that was made, and that it was for all the taxes then due, *held*, that the second sale of the same land on the same day, for taxes of a different year, was void, and no redemption was required.—*Shoemaker v. Lacey*, Sup. Ct. Iowa, West. Jur., July, p. 424.

TRADE-MARKS.—*Held*, that a manufacturer has the right to label his goods with his own name and that of his mill, if no fraudulent purpose is intended; Whether a trade-mark whose reputation depends on the excellence of the manufacture, or the skill and honesty of the manufacturer, can be legally assigned, *quære*; Whether the English practice of retaining a firm name, when no original partner remains, is recognized in American law, *quære*.—*Carmichel v. Latimer*, Sup. Ct. R. I., C. L. J., July 6, p. 7.

TRUSTS.—Where there is an active trust created for life it will not fail during the continuance of that life, although the contingency (birth of issue) has become improbable.—*Delbert's App* Sup. Ct. Pa., C. L. N., June 16, p. 326.

TRUSTS—Continued.

— Resulting trust; The bill alleged that the complainant and Enos Smith entered into a verbal agreement, whereby the latter was to contract for the purchase of the land in question, and agree to pay the stipulated price, and that the complainant was to furnish and pay one-half of the purchase price, and have a deed to an undivided half interest in the lands purchased; that under such verbal agreement Enos Smith entered into a contract for the land in his own name; *Held*, that the facts stated in the bill were sufficient to raise a resulting trust.—*Smith v. Smith*, Sup. Ct. Ill., C. L. N., July 7, p. 352.

WILLS.—Undue influence operating on the mind of an elderly woman, weakened by intemperance, inflamed by abnormal sensual desire, and subjected to the persuasions of one, the object of the inflamed longings, whose relations of confidence gave him ample opportunity of accomplishing his private ends, is an imprisonment of the mind not less cogent than actual duress, and is sufficient to avoid a will made under such influence.—*Dushane's App.*, *Connell's Estate*, Sup. Ct. Pa., W. N. C., May 31, p. 78.

— Where a legatee under a will is shown to have had actual knowledge of proceedings to set it aside, he cannot be permitted to come in afterwards and review the controversy on the ground that legal and formal notice had not been served on him.—*App. of Frances Johnston*, *Cornell's Estate*, Sup. Ct. Pa., W. N. C., May 31, p. 80.

— Proof of execution of will; Refusal to probate when proof not in compliance with statute.—*The Gaines Case*, U. S. Cir. Ct., D. La., C. L. N., June 2, p. 305.

— Construction of; Charitable use: Devise to county as trustee; Municipal corporation; Power to administer trusts; Act of April 15, 1834, § 3 (*Purd. Dig.* 295, pl. 5); Devise to "the poor" of a designated township; When trustee appointed; Vagueness of the trust or uncertainty of the *cestui que trust* not material.—*County of Lawrence et al. v. Leonard et al.*, Sup. Ct. Pa., W. N. C., June 14, p. 121.

SOUTHERN LAW REVIEW

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I. COMPOSITION IN BANKRUPTCY.

By virtue of the absolute dominion which every man has over his own property, a creditor at common law could refuse to receive less than the full amount due him in satisfaction and discharge of his demand, although a compromise might be for the best interest—not merely of other creditors, but of himself. In this way an obstinate creditor could defeat an advantageous composition unless his terms were accepted by the debtor and the other creditors. Such a power in the hands of an exacting and unscrupulous creditor, although legal, was inequitable, for it enabled him to violate that principle of equality which is equity, and, moreover, was contrary to that principle of natural justice which dictates that the majority of those having a common interest shall have the right to prescribe the course of action to be pursued by all.

The 17th section of the act of June 17, 1874 (18 Stat. 182), was passed for the purpose of remedying this wrong. It provides for the adoption of a resolution of composition in all cases in bankruptcy, whether voluntary or involuntary, and whether an adjudication has been had or not. By the express terms of the statute a case in bankruptcy must be pending in order to authorize the commencement of a proceeding for a composition.¹ Such a case would not be pending if the court had no jurisdiction of the cause, but, inasmuch as the requirement is merely that the case shall be

¹ *In re* Reiman & Friedlander, 11 B. R. 21; 13 B. R. 128; 7 Ben. 455; 12 Blatchf. 552.

pending, mere defects in the petition in bankruptcy, which do not affect the jurisdiction, will not vitiate a proceeding for a composition. This was so decided in a case where the petition in involuntary bankruptcy alleged that the petitioners constituted the requisite proportion in number and amount of the creditors of one of the petitioners, instead of the debtor.² The case is pending from the time of the filing of the petition in bankruptcy; and as the statute expressly provides for the institution of proceedings for a composition, whether an adjudication has been had or not, the absence of an adjudication of bankruptcy will not render them void in either a voluntary or involuntary case.³ It has, however, been held that such an adjudication should be made; but this may be deemed doubtful, for the statute authorizes a proceeding in a pending case before adjudication, the very object of which is to suspend and eventually terminate the case without going through the ordinary course of a proceeding in bankruptcy. It would, therefore, seem to be the better doctrine that the proceeding for a composition, in general, stays or suspends all other proceedings in the case until it is finally disposed of.

The statute provides for the acceptance of a composition proposed by a "debtor;" but this term includes corporations as well as natural persons.⁴ So, at least, is the judgment of respectable authority; but it must be confessed that the question cannot be deemed to be settled yet, for a resolution of composition is a discharge within the meaning of the bankrupt law, and the Revised Statutes (§ 5122) provide that no discharge shall be granted to a corporation. If the case is pending by or against a firm, one partner may make a proposition alone, for the term "debtor" is construed to mean any one or more of the debtors. In such case all may unite in a proposition, or each debtor may make a proposition for himself.⁵

A petition for a meeting to consider a proposed com-

² *In re Morris*, 11 B. R. 443.

³ *In re Aaron Van Auken*, 14 B. R. 425.

⁴ *In re Weber Furniture Co.*, 13 B. R. 529, 559.

⁵ *Pool v. McDonald*, 15 B. R. 560.

promise may be filed by the debtor or bankrupt, as the case may be, or by any creditor of such debtor or bankrupt, and must be duly verified. It must set forth that a compromise has been proposed by the debtor or bankrupt, and that the petitioner verily believes that such proposed composition will be accepted by two-thirds in number and one-half in value of the creditors of such debtor or bankrupt, in satisfaction of the debts due from such debtor or bankrupt.⁶ The fair inference from this language is that the terms of the proposed compromise need not be set out at length; but if they are, the creditors, at the meeting, may accept or reject that proposition, and the debtor may make, and the creditors may accept, a different proposition.⁷

Upon the filing of the petition the court must forthwith order a meeting of the creditors to be called, to consider the proposition.⁸ This order may be made by the judge, or, if there is no contest, by the register.⁹ The statute provides that the meeting shall be called under the direction of the court, but does not direct by whom the notices shall be sent. The fair inference is that this matter is left to the court to fix in its order. In practice, the notices are sent by the clerk, marshal, or register.¹⁰ The creditors are to be notified of the time, place, and purpose of the meeting, but not necessarily of the precise proposition to be made.¹¹ A notice must be sent to each known creditor not less than ten days before the meeting. It may be personal or otherwise, as the court may direct. It is generally sent by mail, and, in that case, should be properly addressed and postpaid.¹² If the notices are sent by the register, his own memorandum is sufficient proof that they have been duly sent. If they are sent by the clerk or the marshal, the officer so sending them should

⁶ Rule xxxvi.

⁷ *In re Haskell*, 11 B. R. 164.

⁸ Rule xxxvi.

⁹ *In re Henry H. Stafford*, 13 B. R. 378.

¹⁰ *In re Michael H. Spades*, 13 B. R. 72; 6 Biss. 448.

¹¹ *In re Haskell*, 11 B. R. 164.

¹² *In re Michael H. Spades*, 13 B. R. 72; 6 Biss. 448.

make a return of that fact on or before the day appointed for the meeting.

The register acting in the case, or, if no register has been assigned, a register to be designated by the court, must hold and preside at the meeting at the time and place specified in the notice.¹³ He has the power to regulate the form and order of proceedings at the meeting, and to decide questions that arise, subject to review by the court.¹⁴ The debtor, unless prevented by sickness, or other cause satisfactory to the meeting, must be present, and produce a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts are due. If he is prevented from being present, some one in his behalf may produce the statement. If the debtor has already filed sworn schedules, he may use them as the written statement.¹⁵ The statute specifies no form, manner, or time at which the statement shall be made or presented, and, therefore, if the debtor is examined, his testimony will be deemed to constitute a part of his statement.¹⁶ Where a debt arises upon a bill of exchange or promissory note, the debtor, if he does not know who is the holder thereof, may state the amount of such bill or note, the date on which it falls due, the name of the acceptor and of the person to whom it is payable, and any other particulars within his knowledge respecting the same, and the insertion of such particulars is a sufficient description in respect to such debt. If a debtor disputes the claim of a creditor, he should have the amount ascertained either by the trial of an action at law or by an enquiry in the bankrupt court.¹⁷ If the amount due to any creditor is found to be different from that contained in the statement, the statement should be altered at once and the true amount inserted.¹⁸

¹³ Rule xxxvi.

¹⁴ *In re* Holmes & Lissberger, 12 B. R. 86.

¹⁵ *In re* Haskell, 11 B. R. 164.

¹⁶ *In re* Reiman & Friedlander, 13 B. R. 128; 12 Blatchf. 562.

¹⁷ *In re* Trafton, 14 B. R. 507.

¹⁸ *Ex parte* Peacock, L. R. 8 Ch. App. 682; *In re* B. C. Asten, 14 B. R. 7.

The statute merely provides that the creditors may accept the composition proposed by the debtor, and that the provisions of the composition so accepted shall be binding on them. It has, therefore, left the debtor and the creditors to arrange the terms of the composition in each particular case. To this remark there is one exception. Every composition subject to the priorities allowed by the bankrupt law must provide for a *pro rata* payment or satisfaction in money to the creditors in proportion to the amount of their unsecured debts, or their debts in respect to which they may have surrendered any security held by them. If any of the creditors are entitled to priority, the composition should provide for it; otherwise they might be entitled to share only *pro rata* with the other creditors.¹⁹ The term "money" is used, in contradistinction to property, so as to preclude all traffic, or dicker, or speculation in property by which a large nominal debt may be paid by small actual value, or by which one creditor may receive more than another. The amount or proportion to be paid must be fixed in currency, and all must receive alike.²⁰ A composition, therefore, cannot provide for a payment in notes.²¹ Where notes are to be used, the proper provision is that the payment shall be secured by notes. The term "money," however, does not mean cash on the nail or on demand, but that, whenever paid, it shall be in what the law admits to be money. A composition may, therefore, provide for payment in instalments at stated future times.²² If the debtor desires to relieve himself from the obligation at common law to seek the creditor and tender the composition, he should make the money payable within a certain time after notice or demand, or introduce some other provision for his protection.²³ If the payment is to be 'secured by an endorsement, the resolution should either

¹⁹ *Ex parte* Walter, L. R. 15 Eq. 412.

²⁰ *In re* Reiman & Friedlander, 13 B. R. 128; 12 Blatchf. 562.

²¹ *In re* Langdon, 13 B. R. 60; *In re* James T. Hurst, 13 B. R. 455.

²² *In re* Langdon, 13 B. R. 60; *In re* Reiman & Friedlander, 11 B. R. 21; 13 B. R. 128.

²³ *Hazard v. Mare*, 6 H. & N. 435.

name the endorser or provide for his being but a provision that the endorser shall certain persons who act as a committee sufficient.²⁵ If the endorser is to be secured in the payment of the property, the trust as to any interest shall remain after the payment of the composition declared; otherwise the endorser may be liable for it.²⁶ The resolution may provide for the trustee, either to receive and distribute the proceeds of the composition, or to take an assignment of the assets to secure the payment of the composition. Under the English statute the debtor remains in the control of his property,²⁷ but our act, in the emergency of a case in bankruptcy, to a certain extent takes from him that control.²⁸ If he desires to dispose of his assets, in order to meet the claims, he stipulates to pay, he may insert a provision to that effect.²⁹

The debtor, at the meeting, must answer the questions that may be made of him. It is not the intention that the debtor shall answer only such questions as are put by the meeting, or with its consent. The meeting is designed to protect the minority, and enable them to protect themselves and the majority upon the proposed composition before it is voted. The creditors, therefore, may examine the debtor, although he may object to his doing so,³⁰ and, if he desires, the composition must be completed before the vote on

²⁴ *In re Reiman & Friedlander*, 11 B. R. 21; 7 Ben.

²⁵ *In re Solomon Louis*, 14 B. R. 144; 7 Ben. 481.

²⁶ *Ex parte Wilcocks*, 44 L. J. (Bankruptcy) 12.

²⁷ *Ex parte M. & L. D. Banking Co.*, L. R. Birmingham G. & C. Co., L. R. 11 Eq. 204; *Ex parte* Ch. Div. 537.

²⁸ *In re Thomas McKeon*, 11 B. R. 182; 7 Ben. Friedlander, 11 B. R. 21; 7 Ben. 455.

²⁹ *In re Aaron Van Auker*, 14 B. R. 425; *In re* R. 182; *In re Reiman & Friedlander*, 11 B. R. 21; 7 Ben.

³⁰ *In re Morris*, 11 B. R. 443; *In re Holmes & L.*

be taken.³¹ If other creditors are not willing to be detained while the examination is in progress, the taking of the vote may be postponed to a specified time, and those who do not desire to remain can depart, and return at the designated time.³² The creditor is entitled to the fullest opportunity to put questions calculated to ascertain all the material facts in regard to the debtor's affairs, but this right must be exercised in good faith, and the examination must be confined to such material facts.³³ The object in view in requiring the debtor to be present and answer enquiries is to enable any creditor who is dissatisfied with the contents of the statement, or may regard it as inaccurate in omitting things which it ought to contain, or in containing erroneous items, to ask the debtor as to the particulars respecting which information is thought to be desirable, and thus arrive at a true exhibit of his affairs. The enquiries, therefore, must be only such as will properly be in furtherance of such object, and such as will aid in determining whether any composition at all ought to be accepted, or the terms of the one which ought to be accepted.³⁴ If the debtor has kept books in his business, such books must be produced on the demand of any creditor, and the debtor must answer all enquiries in reference to any entry in such books which bears upon the question of the exact condition of his affairs. If it seems necessary that time shall be allowed to have them examined by an expert, an adjournment may be had for that purpose.³⁵ The examination of the debtor should be conducted in the same manner as the examination of a witness in open court, and the debtor should answer the enquiries made of him by the creditor, and do no more until the creditor has finished, after which he may, of his own volition or in answer to interrogatories by his counsel, make such explanations as are relevant. The

³¹ *In re* Holmes & Lissberger, 12 B. R. 86.

³² *In re* Holmes & Lissberger, 12 B. R. 86.

³³ *Ex parte* Mackenzie, L. R. 10 Ch. App. 88.

³⁴ *In re* Holmes & Lissberger, 12 B. R. 86.

³⁵ *In re* Holmes & Lissberger, 12 B. R. 86.

answers of the debtor should be reduced to writing, in the form of an examination, and the debtor should sign the document and be sworn to the truth thereof.³⁶

After the examination is completed, the vote on the resolution may be taken. The register has the right to decide who are entitled to vote, and in respect to what amount of debt, and pass upon the propriety and regularity in form of the proofs of debt and the letters of attorney.³⁷ The statute provides that the creditors may resolve that a composition proposed by a debtor shall be accepted. The term "creditors," however, is not used in a technical sense, but includes all persons who have provable claims.³⁸ The mere fact that the name of a creditor appears on the statement does not give him the right to appear without proof, and be recognized as a creditor for the sum named. None but *bona fide* creditors are to have a voice in the proceedings, and the mere fact that the debtor chooses to put their names on his statement does not, even *prima facie*, establish that they are creditors. Every one who claims to be a creditor must, therefore, establish his claim. If a creditor, however, in an involuntary case, is one of the petitioning creditors, and has established his debt so as to obtain the issuing of an order to show cause, he need not prove his debt anew.³⁹ As a minor cannot bind himself by a valid contract, he is not competent to vote.⁴⁰ The same principle would seem to be applicable to a *feme covert*, but it has been held that she may vote if she has the authority of her husband, whether exhibited or not, and that an affidavit subsequently filed by him to the effect that she had such authority is a ratification which relates back to the vote and gives it validity.⁴¹ If a child of one of the debtors is *sui juris*, he may prove his claim and vote, although it consists of a note made payable to his

³⁶ *In re* Holmes & Lissberger, 12 B. R. 86.

³⁷ *In re* Holmes & Lissberger, 12 B. R. 86.

³⁸ *In re* Trafton, 14 B. R. 507.

³⁹ *In re* Scott, Collins & Co., 15 B. R. 73.

⁴⁰ *Ex parte* Greaves, L. R. 5 Ch. App. 326.

⁴¹ *In re* Bailey & Pond, 2 Woods, 222.

father as guardian, which has never been endorsed to him.⁴² Where a partnership proposes a composition, all the creditors, both partnership and individual, may vote without any classification if no objection is made; but if one of any class of creditors perceives that the other class is about to force an unjust composition upon him, he may demand a separate vote.⁴³ A creditor may buy up the claims of others and vote thereon to defeat the composition, if his motive is merely to realize more money from the estate thereby.⁴⁴ When an attorney at law appears before the register to represent a creditor, he is to be accepted as such attorney unless some one puts him to proof, by a rule therefor, to show his authority.⁴⁵ All others who desire to vote on behalf of another must produce a letter of attorney duly executed.⁴⁶ If the letter of attorney specially authorizes the attorney to sign a composition for a precise sum, thus leaving him a mere ministerial duty to perform, there is no incompatibility in the same person appearing as attorney for the debtor and also as attorney in fact for a creditor.⁴⁷

In order that the resolution may be adopted, it is necessary that it shall receive the votes of a majority in number and three-fourths in value of the creditors assembled at the meeting, either in person or by proxy; but, in calculating the majority, creditors whose debts amount to sums not exceeding \$50 are reckoned in the majority in value, but not in the majority in number, and the value of the debts of secured creditors above the amount of the security, to be determined by the court, is estimated in the same way. Creditors whose debts are fully secured are not entitled to vote on or sign the resolution without first relinquishing the security. This provision in regard to secured creditors applies only to those

⁴² *In re* Bailey & Pond, 2 Woods, 222.

⁴³ *In re* Michael H. Spades, 13 B. R. 72; 6 Biss. 448; *Tomlin v. Dutton*, L. R. 3 Q. B. 466; *Ex parte* Glen, L. R. 2 Ch. App. 670.

⁴⁴ *In re* Morris, 12 B. R. 170.

⁴⁵ *In re* Scott, Collins & Co., 15 B. R. 73. *Contra, In re* Purvis, 1 B. R. 163.

⁴⁶ *In re* Scott, Collins & Co., 15 B. R. 73.

⁴⁷ *In re* Weber Furniture Co., 13 B. R. 529, 559.

who have a lien, in some form, on the debtor's property. A creditor who has personal security, such as an endorsement, is to be counted as an unsecured creditor.⁴⁸ Where the assets are sufficient to pay workmen to the extent of \$5 each, they are within the equity of the law, and their claim cannot be counted except to the extent of their respective debts above \$50.⁴⁹ A creditor who has an attachment issued within four months before the commencement of the proceedings in bankruptcy is a secured creditor.⁵⁰ A claim for damages on account of a trespass to personal property which is unliquidated, and marked on the statement as disputed cannot be counted.⁵¹ A claim held by a minor must be taken into account in the computation, although he cannot vote. Creditors whose debts do not exceed \$50 are not to be reckoned in any part of the process of calculating the number, either as a part of the whole number or as a part of the requisite proportion.⁵²

If the resolution is adopted by the requisite proportion of the creditors, it must afterwards be confirmed by the signatures thereto of the debtor, and two-thirds in number and one-half in value of all the creditors. It is not necessary that a second meeting of creditors, as such, shall be held to confirm the resolution,⁵⁴ or that the confirmation shall take place at the first meeting.⁵⁵ The confirmatory signatures may be obtained after the first meeting,⁵⁶ and a reasonable time will be allowed for this purpose,⁵⁷ but they must be obtained before the hearing for a ratification.⁵⁸ In determining

⁴⁸ *In re* Michael H. Spades, 13 B. R. 72; 6 Biss. 448.

⁴⁹ *In re* O'Neil, 14 B. R. 210.

⁵⁰ *In re* Scott, Collins & Co., 15 B. R. 73.

⁵¹ *In re* Bailey & Pond, 2 Woods, 222.

⁵² *Ex parte* Greaves, L. R. 5 Ch. App. 326.

⁵³ *In re* John B. Gilday, 11 B. R. 108; 7 Ben. 491.

⁵⁴ *In re* Scott, Collins & Co., 15 B. R. 73.

⁵⁵ *In re* Benjamin F. Spillman, 13 B. R. 214; *In re* Scott, Collins & Co. 15 B. R. 73.

⁵⁶ *In re* Benjamin F. Spillman, 13 B. R. 214.

⁵⁷ *In re* Michael H. Spades, 13 B. R. 72; 6 Biss. 448; *In re* Benjamin F. Spillman, 13 B. R. 214.

⁵⁸ *In re* Scott, Collins & Co., 15 B. R. 73.

whether the requisite proportion of the creditors have confirmed the resolution, the same mode of computation is observed as in determining whether the resolution has been duly adopted.⁵⁹

In composition cases the register should keep a docket and minutes, but need not send the usual memoranda to the court.⁶⁰ He should cause the proceedings, as they take place before him, to be reduced to writing, in order that he may make a report thereof.⁶¹ It is his duty to report the proceedings to the court, with his opinion thereon.⁶² It has been said that he need not pass upon the confirmation,⁶³ but where an order is passed, referring the case to him, it is usual to direct him to pass upon the confirmation, and also to report whether the composition is for the best interest of all concerned.⁶⁴ It would seem to be the better practice for him to retain the proceedings in all cases until the confirmation is filed with him, and then to transmit the proceedings to the court, with his opinion on all the questions involved. The proposition, statement, resolution, and confirmation, together with such evidence as may have been taken, should all be so transmitted.

As soon as the proceedings are filed, the clerk should give notice, of not less than five days, to all the creditors to show cause why the resolution shall not be recorded.⁶⁵ It is not necessary that the debtor shall appear on the day appointed for the hearing, to submit anew the statement previously made by him, or any other statements.⁶⁶ Nor is he then subject to examination as a matter of right.⁶⁷ But, if a creditor can show that justice will be furthered thereby, the

⁵⁹ *In re* John B. Gilday, 11 B. R. 108; 7 Ben. 49; *In re* Wald & Achle, 12 B. R. 49; *In re* Michael H. Spades, 13 B. R. 72; 6 Biss. 448.

⁶⁰ *In re* Benjamin F. Spillman, 13 B. R. 214.

⁶¹ *In re* Holmes & Lissberger, 12 B. R. 86.

⁶² Rule xxxvi. *Vide In re* Weber Furniture Co., 13 B. R. 559.

⁶³ *In re* Benjamin F. Spillman, 13 B. R. 214.

⁶⁴ *In re* Scott, Collins & Co., 15 B. R. 73.

⁶⁵ Rule xxxvi.

⁶⁶ *In re* Scott, Collins & Co., 15 B. R. 73.

⁶⁷ *Ex parte* Levy & Co., L. R. 11 Eq. 619; *In re* Godfrey Davis, 19 W. R. 524.

court, in its discretion, may direct an examination.⁶⁸ An objection may also be taken, at the hearing, to the legality of a debt which was proved at the meeting.⁶⁹ If a controversy arises, the court may refer the matter to the register for enquiry as to any particular facts.⁷⁰

On the day appointed for the hearing, opposition may be made to the recording of the resolution. A creditor who is fully secured cannot enter an objection, and it is doubtful whether he can then surrender his security for the purpose of opposition, for he ought to elect at or before the meeting of creditors, and not speculate on the chances of litigation.⁷¹ The grounds of opposition are prescribed by the statute, and this excludes all others. The fact, therefore, that the debtor has given a preference,⁷² or made an assignment for the benefit of creditors,⁷³ does not of itself constitute a ground for rejecting the resolution. An opposing creditor may file any objection which goes to the regularity of the proceedings—as, for instance, that the resolution was not duly passed, or that the requisite confirmatory signatures have not been obtained, or may object on the ground that the composition is not for the best interest of all concerned.⁷⁴ The refusal of the debtor to answer a material question at the meeting,⁷⁵ or a failure to produce a statement of assets and debts,⁷⁶ is a matter which affects the regularity of the proceedings and constitutes a sufficient cause for refusing to record the resolution. A composition, however, may be valid although the statement is defective in omitting either a debt or an asset. As to this point each case must be determined according to its own particular facts, and depends

⁶⁸ *Ex parte* Jones, L. R. 16 Eq. 386; *Ex parte* Tachiri, L. R. 2 Ch. App. 368; *Ex parte* Brooks, 12 W. R. 924; *In re* Marks' Trust Deed, L. R. 1 Ch. App. 429; *In re* Godfrey Davis, 19 W. R. 524.

⁶⁹ *Ex parte* Weil, L. R. 5 Ch. Div. 345.

⁷⁰ *In re* Blaney T. Walshe, 2 Woods, 225.

⁷¹ *In re* Scott, Collins & Co., 15 B. R. 73.

⁷² *In re* Haskell, 11 B. R. 164.

⁷³ *Pool v. McDonald*, 15 B. R. 560.

⁷⁴ *In re* Scott, Collins & Co., 15 B. R. 73.

⁷⁵ *Ex parte* Mackenzie, L. R. 10 Ch. App. 88; *In re* Morris, 11 B. R. 443.

⁷⁶ *Ex parte* Sidey, 24 L. T. (N. S.) 401.

mainly on fraud or good faith as affecting the question whether a resolution so passed is for the best interest of all concerned.⁷⁷ In determining whether the requisite proportion of the creditors have agreed to the resolution, the court is governed by the statement, and if that shows that the requisite proportion have not so agreed, the resolution will be rejected, although the statement is inaccurate.⁷⁸

The statute has vested the creditors with the power to decide upon the proposition of compromise, after a full investigation into the affairs of the debtor, and the action of the court is in the nature of a review on appeal. Hence the presumption is in favor of their decision, and if an objecting creditor desires to introduce any facts not shown before them he must produce the evidence.⁷⁹ In one case, where the resolution and statement alone were presented to the court, without the examination taken at the meeting, it was held that the resolution must be recorded.⁸⁰ But, in all cases, the fact that the attention of the creditors at the meeting was called to a matter which is made the ground for an objection before the court has an important influence upon the decision of the question.⁸¹

The power, however, that is given to a majority of the creditors to bind the minority is in the nature of a statutory power, the exercise of which is valid only when it is free from all fraud.⁸² The statute assumes, as an essential condition to the validity of the composition, that it shall be in all respects just, and any taint of fraud, whether it consists in concealment, misrepresentations, inequality, or injustice, vitiates the arrangement.⁸³ The mere fact that the majority

⁷⁷ *In re* Scott, Collins & Co., 15 B. R. 73; *In re* Reiman & Friedlander, 11 B. R. 21; 13 B. R. 128; 7 Ben. 455; 12 Blatchf. 562.

⁷⁸ *In re* B. C. Astens, 14 B. R. 7.

⁷⁹ *In re* Weber Furniture Co., 13 B. R. 529, 559.

⁸⁰ *In re* Weber Furniture Co., 13 B. R. 529, 559.

⁸¹ *In re* Reiman & Friedlander, 11 B. R. 21; 13 B. R. 128; 7 Ben. 455; 12 Blatchf. 562; *In re* Blaney T. Walshe, 2 Woods, 225; *Ex parte* Linsley, L. R. 9 Ch. App. 290.

⁸² *Ex parte* Cowen, L. R. 2 Ch. App. 563.

⁸³ *Ex parte* Williams, L. R. 10 Eq. 57.

are animated by motives of kindness towards the debtor does not, of itself, render the composition fraudulent,⁸⁴ but they cannot practise the moral virtues at the expense of other people. To hold the contrary would be directly opposed to the commonest principles of justice and honesty.⁸⁵ A resolution, passed merely for the purpose of giving relief to the debtor, is not a *bona fide* exercise of the power, nor such a bargain as the statute contemplates or requires. A resolution may be recorded although there are no available assets;⁸⁶ but in such case, if it provides for the payment of a merely nominal composition without security, it will be rejected upon the objection of a dissentient creditor, as a fraud on the law.⁸⁷ The mere fact that the resolution was passed for the purpose of defeating a judgment creditor does not render the composition fraudulent, but is a circumstance to be considered in connection with the other facts in the case.⁸⁸

The principle of law which requires that the majority shall exercise their power in good faith, for the benefit of all the creditors, prohibits the influencing of their votes by any unfair means. If a claim, therefore, is sold by the holder for an amount in excess of the composition, a resolution which is carried only by means of such vote will not be confirmed.⁸⁹ It has also been held that, if a creditor is induced to vote, or to withdraw his opposition to the resolution, by any unfair means, whether known to the debtor or not, his vote, so influenced, operates as a fraud on the other creditors and renders the composition voidable by any one of them. But the mere fact that claims have been bought at a price

⁸⁴ *Ex parte Linsley*, L. R. 9 Ch. App. 290.

⁸⁵ *Ex parte Williams*, L. R. 10 Eq. 57; *Ex parte Cowen*, L. R. 2 Ch. App. 563; *Hart v. Smith*, L. R. 4 Eq. 61; *In re Weber Furniture Co.*, 1 B. R. 559.

⁸⁶ *Ex parte Elworthy*, L. R. 20 Eq. 742.

⁸⁷ *In re Terrell*, L. R. 4 Ch. Div. 293; *Ex parte Morrison*, 43 L. J. (Bankruptcy) 47.

⁸⁸ *Ex parte Cowen*, L. R. 2 Ch. App. 563; *Ex parte Morrison*, 43 L. J. (Bankruptcy) 47.

⁸⁹ *Ex parte Cobb*, L. R. 8 Ch. App. 727; *In re Fore Street Warehouse Co.*, 30 L. T. (N. S.) 624.

⁹⁰ *In re James M. Sawyer*, 14 B. R. 241.

excess of the composition will not prevent the recording of the resolution if it was known to the creditors at the meeting, and the resolution was passed by the requisite proportion of the creditors, without counting the claims so purchased.⁹¹ In regard to what constitutes unfair means, it has been held that the expectation of an advantage, without any positive promise, does not leave the vote so unbiased that it can be deemed a fair vote.⁹²

Although the resolution may have been passed in good faith, yet it cannot be recorded unless it is for the best interest of all concerned. This means the best interest at the time, in view of all the circumstances.⁹³ The interest of all is to be considered, and the resolution will not be rejected merely because a peculiar benefit will thereby accrue to some particular creditor.⁹⁴ The mere fact that the payment of the composition is secured by the personal agreement of the debtor is not, of itself, sufficient cause for rejecting the resolution.⁹⁵ But if the composition does not provide for the payment of as much as the assets may be reasonably expected to pay, then it is not for the best interest of all concerned, and will not be recorded.⁹⁶ In passing upon this question some deference is always given to the judgment and discretion of the creditors who are presumed to be familiar with the debtor's business and the value of the assets, and their decision will not be weighed with extreme nicety, nor overruled on account of any slight difference between the value of the assets and the proposed composition.⁹⁷ The question is not whether the debtor might have offered more, but

⁹¹ *In re* Blaney T. Walshe, 2 Woods, 225.

⁹² *In re* James M. Sawyer, 14 B. R. 241.

⁹³ *In re* Haskell, 11 B. R. 164.

⁹⁴ *In re* Scott, Collins & Co., 15 B. R. 73.

⁹⁵ *Ex parte* Roots, L. R. 2 Ch. App. 559.

⁹⁶ *In re* Reiman & Friedlander, 11 B. R. 21; 13 B. R. 128; 7 Ben. 455; 12 Blatchf. 562; *In re* Morris, 11 B. R. 443; *In re* Scott, Collins & Co., 15 B. R. 73; *Ex parte* Cowen, L. R. 2 Ch. App. 563; *Hart v. Smith*, L. R. 4 Ex. 61; *Ex parte* Williams, L. R. 10 Eq. 57; *In re* Page, L. R. 2 Ch. Div. 323.

⁹⁷ *Ex parte* Linley, L. R. 9 Ch. App. 290; *Ex parte* Cowen, L. R. 2 Ch. App. 563; *Ex parte* Roots, L. R. 2 Ch. App. 559.

whether his estate will pay more in bankruptcy.⁹⁸ The elements of this comparison must necessarily vary with the amount of debts, the amount and character of the assets, the nature of the business, and other circumstances.

In some cases, where the resolution has been held to be defective at the hearing, the debtor has desired to change the terms, but it has been uniformly held that this can be done only by calling a new meeting and adopting a new resolution; for the creditors have the sole power to make the resolution, and the court can decide only whether their work conforms to the statute or not.⁹⁹ If no valid resolution has been passed, on account of some mistake on the part of the debtor or on the part of the creditors, or for any other cause, a new meeting may be called; for the case stands then precisely as if no resolution had ever been offered.¹⁰⁰ If the meeting was duly called and held, and the proposition was rejected, after due consideration, by the creditors, a new meeting will not, in general, be called;¹⁰¹ but if the rejection arose by accident or mistake—as, for instance, from a failure on the part of a creditor to properly instruct his attorney—a new meeting may be called.¹⁰²

A mistake made inadvertently in the statement of debts may be corrected, upon a reasonable notice and with the consent of a general meeting of the creditors; but if the composition is payable in instalments, and the time for the payment of the first instalment is past, a meeting will not be called for the purpose of correcting an omission of the name of the holder of a bill of exchange.¹⁰³

The creditors may, by a resolution to be passed in the

⁹⁸ *In re Morris*, 11 B. R. 443; *In re Whipple*, 11 B. R. 524.

⁹⁹ *In re Reiman & Friedlander*, 11 B. R. 21; 13 B. R. 128; 7 Ben. 45; 12 Blatchf. 562; *In re B. C. Asten*, 14 B. R. 7; *In re Scott, Collins & Co.*, 15 B. R. 73.

¹⁰⁰ *In re Morris*, 11 B. R. 443; *In re Terrell*, L. R. 4 Ch. Div. 293; *Ex parte Cobb*, L. R. 8 Ch. App. 727.

¹⁰¹ *In re McDowell & Co.*, 10 B. R. 439; 6 Biss. 193; *Ex parte Cobb*, L. R. 8 Ch. App. 727.

¹⁰² *In re McDowell & Co.*, 10 B. R. 439; 6 Biss. 193.

¹⁰³ *Ex parte Matthews*, L. R., 10 Ch. App. 304.

same manner and under the same circumstances as the original resolution, add to or vary its provisions. The meeting for this purpose, within the contemplation of the statute, is one that is to follow the recording of the original resolution,¹⁰⁴ and is allowed for some cause that occurs or is discovered subsequently—as, for instance, if the debtor should unexpectedly be held liable on a claim against which he thought he had a good defence, and for this reason should be unable to comply with the original resolution.¹⁰⁵ Such additional resolution must be presented to the court in the same manner, and proceeded with in the same way, and with the same consequences, as the original resolution. No person taking interests under the original resolution, who does not assent to such addition or variation, can be prejudiced thereby; but this provision does not apply to a creditor who was bound by the original resolution. He will be bound by the additional resolution, although it is adopted after the debtor has made default in the payment of an instalment under the original resolution.¹⁰⁶ But a creditor whose name was omitted from the statement produced at the original meeting would not be so bound.¹⁰⁷

The district court has full control over the order to record the resolution, and may vacate it upon the application of any creditor who can show that the composition was obtained by fraud, either in the concealment of assets or in procuring the assent of creditors by unfair means.¹⁰⁸

The provisions of the resolution are binding on all the creditors whose names and addresses, and the amounts of the debts due to whom, are shown in the statement produced at the meeting, but does not, in general, affect or prejudice the rights of any other creditor. The debt will be barred, although the amount was not stated accurately—as, for instance, by giving the principal and omitting the interest.¹⁰⁹

¹⁰⁴ *In re* Scott, Collins & Co., 15 B. R. 73.

¹⁰⁵ *Ex parte* Radcliffe Investment Co., L. R. 17 Eq. 121.

¹⁰⁶ *Ex parte* Radcliffe Investment Co., L. R. 17 Eq. 121.

¹⁰⁷ *Ex parte* Radcliffe Investment Co., L. R. 17 Eq. 121.

¹⁰⁸ *In re* Thorpe, L. R. 8 Ch. App. 743; *In re* James M. Sawyer, 14 B. R. 241.

¹⁰⁹ *Beebe v. Pyle*, 1 Abb. (N. C.) 412.

But the creditor will not be bound where a sum is put down as claimed, with a remark that it is in dispute, for the statute applies only to debts the amount of which is ascertained. The debtor cannot dispute a debt and at the same time compound for it.¹¹⁰ If the debtor puts down the name and amount due to the payee of a note or bill of exchange, and it is held by another, the claim of the latter is not barred.¹¹¹ The provision that the composition shall not affect the rights of a creditor whose name and address were omitted from the statement does not apply to a creditor who appeared at the meeting and voted for the resolution, for the statute contemplates two kinds of creditors who may be bound by a composition—those who are bound because they have agreed to be bound, and those who are bound although they have not so agreed—and the provision applies only to the latter class.¹¹² The statute, in providing who shall be bound by a composition, uses the phrase, “all creditors,” and as it is the latest enactment, and repeals all prior acts inconsistent therewith, there is no exception of fiduciary debts, or debts created by fraud, as in the case of a discharge.¹¹³

Although a resolution operates as a satisfaction of the debt due to a secured creditor, yet it does not deprive him of his security, but merely confines him to his security and discharges the debtor from personal liability.¹¹⁴ An attachment is within the protection of this principle where no assignee has been appointed, although it was issued within the period of four months prior to the commencement of the proceedings in bankruptcy.¹¹⁵ It is true that the Revised Statutes (§ 5044) provide that an assignment shall relate

¹¹⁰ *Melhado v. Watson*, L. R. 2 C. P. Div. 281. *Vide In re Trafton*, 14 B. R. 307.

¹¹¹ *Ex parte Matthews*, L. R. 10 Ch. App. 304.

¹¹² *Campbell v. Im Thurn*, L. R. 1 C. P. Div. 267.

¹¹³ So held in a recent case in the Supreme Court of New Hampshire.

¹¹⁴ *In re J. L. Lytle & Co.*, 14 B. R. 457; *Ex parte M. & L. D. Banking Co.*, L. R. 18 Eq. 249; *Ex parte Birmingham G. & C. Co.*, L. R. 11 Eq. 204; *Ex parte Jones*, L. R. 10 Ch. App. 663.

¹¹⁵ *In re W. D. Clapp & Co.*, 14 B. R. 191; *In re Shields*, 15 B. R. 532. *Contra*, *Miller v. Mackenzie*, 13 B. R. 406; 43 Md. 404; *Smith v. Engle*, 14 B. R. 481.

back, and dissolve such attachment; but this provision does not apply to a composition without an appointment of an assignee and an assignment to him, for express words or a clear implication are necessary in order to take away a legal right. If an attachment has been dissolved by an assignment, a subsequent resolution will not revest the security in the creditor.¹¹⁶ If a creditor proves his debt as unsecured, and votes in favor of the resolution, he cannot afterwards set up his security, for this would be a fraud on the other creditors.¹¹⁷

A resolution of composition is a discharge,¹¹⁸ and hence is within the provision of the Revised Statutes (§ 5118) which enacts that no discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, endorser, surety, or otherwise.¹¹⁹ It also seems to be the better doctrine that such joint debtor or surety would not be released, although the creditor voted in favor of the resolution; for, if the law were otherwise, a great number, or even a majority, of the creditors in some cases could not vote without imperilling their rights.¹²⁰

It is not necessary that a creditor shall prove his debt prior to the tender of the composition, or in order to be entitled to receive it, for the amount inserted in the statement is the amount upon which the composition is to be paid.¹²¹ If the resolution does not fix the time for the payment of the composition, the debtor is entitled to a reasonable

¹¹⁶ *In re* W. D. Clapp & Co., 14 B. R. 191; *In re* Chidley, L. R. 1 Ch. Div. 177.

¹¹⁷ *In re* Balbernie, L. R. 3 Ch. Div. 488.

¹¹⁸ *In re* Alphonse Bechet, 12 B. R. 201; 2 Woods, 173; *In re* Knight, 2 W. N. 479.

¹¹⁹ *M. & H. Organ Co. v. Bancroft*, 1 Abb. (N. C.) 415; *Megrath v. Gray*, L. R. 9 C. P. 216; *Andrew v. Macklin*, 6 B. & S. 201; *Ex parte* Jacobs, 10 Ch. App. 211. *Contra*, *Wilson v. Lloyd*, L. R. 16 Eq. 60.

¹²⁰ *Megrath v. Gray*, L. R. 9 C. P. 216; *Ex parte* Jacobs, L. R. 10 Ch. App. 211; *Andrew v. Macklin*, 6 B. & S. 201.

¹²¹ *Ex parte* Peacock, L. R. 8 Ch. App. 682; *Ex parte* Waterer, 22 W. R. 426.

time,¹²² but if it provides that the composition shall be paid within a certain time, then, in order to be entitled to the benefit of the resolution, he must, in the absence of any provision to the contrary, tender the stipulated sum within that time, or the creditor will be restored to his original rights and may sue for his whole debt.¹²³ It is not enough for him to be ready and willing to pay; he must actually pay the money within the prescribed time.¹²⁴ The fact that the creditor voted for the resolution,¹²⁵ or that the payment has been secured by the debtor's note, with a surety,¹²⁶ or that one of several instalments has been paid,¹²⁷ makes no difference in the application of this doctrine. This principle rests upon the fact that the creditors agree to accept the composition, and not the resolution, in satisfaction of their debts. It was the design of the statute that there should be reciprocity, and that the creditor should be bound only if the debtor performed his part according to the terms of the arrangement. To enforce the resolution against the creditor after a default on the part of the debtor would, in effect, be to make a new agreement. The debtor may, therefore, be deemed to be estopped from setting up the terms of a composition which he has wholly neglected to carry out. The creditor is bound by the composition while it remains in force and his rights and remedies are suspended, but when the composition becomes ineffectual he is restored to his original position, and his rights are the same as they would be if the composition had never had any existence. He has, however, an election to resort to the original debt or

¹²² *Edwards v. Coombe*, L. R. 7 C. P. 519.

¹²³ *Edwards v. Coombe*, L. R. 7 C. P. 519; *Newell v. Van Praagh*, L. R. 9 C. P. 96; *Goldney v. Lording*, L. R. 8 Q. B. 182; *In re Hatton*, L. R. 7 Ch. App. 723; *Ex parte Peacock*, L. R. 8 Ch. App. 682. *Vide Ex parte Hemmingway*, 26 L. T. (N. S.) 298.

¹²⁴ *Fessard v. Mugnier*, 18 C. B. (N. S.) 286; *Hazard v. Mare*, 6 H. & N. 435.

¹²⁵ *Edwards v. Hancher*, L. R. 1 C. P. Div. 111.

¹²⁶ *Edwards v. Hancher*, L. R. 1 C. P. Div. 111; *Ers'kine v. Moreland*, 10 Ir. R. C. L. 243.

¹²⁷ *Ers'kine v. Moreland*, 10 Ir. R. C. L. 243.

accept the composition, and if he demands payment of the composition, after a default, this is an election and a waiver of the right to resort to the original debt.¹²⁸ It has also been held that, where the default occurred through a mistake as to the day on which the composition fell due, and the debtor tendered the money within a reasonable time, and before the creditor had availed himself of the default or the condition of the parties had changed, the creditor was then bound by the resolution.¹²⁹ If the resolution appoints a trustee to receive the composition, and the money is paid to him according to the terms thereof, he is the agent of the creditors, and a failure to pay on his part will not affect the debtor.¹³⁰

The district court, on motion made in a summary manner by any person interested, and on reasonable notice, may enforce the provisions of a composition, but not as against a surety. A person who becomes a surety for the payment of a composition does not, by so doing, make himself subject to the jurisdiction of the bankrupt court.¹³¹ A creditor whose name and address were not placed in the statement may waive the protection of the provision which exempts him from being bound by the composition, and apply to the court to enforce its terms against the debtor, but not, perhaps, to the prejudice of other creditors.¹³²

As the provisions of the composition may be enforced on the motion of any party interested, they may be enforced on behalf of the debtor as well as against him. The bankrupt court, therefore, has jurisdiction to restrain a creditor from maintaining an action against the debtor for a debt which is included in the composition.¹³³ One of the objects in con-

¹²⁸ *Ex parte Waterer*, 22 W. R. 426.

¹²⁹ *Newington v. Levy*, L. R. 5 C. P. 607; L. R. 6 C. P. 180.

¹³⁰ *Ex parte Waterer*, 22 W. R. 426; *Campbell v. Im Thurn*, L. R. 1 C. P. Div. 267.

¹³¹ *Ex parte Mirabita*, L. R. 20 Eq. 772.

¹³² *Ex parte Carew*, L. R. 10 Ch. App. 308.

¹³³ *In re Thorpe*, L. R. 8 Ch. App. 743; *In re Trafton*, 14 B. R. 507. *Contra*, *In re J. L. Lytle & Co.*, 14 B. R. 457.

ferring this jurisdiction was that, when a question is raised as to the validity of a composition, the question should be tried, once for all, in a court which had jurisdiction over all the creditors and over all the subject-matter. The court is to try the question—not merely between the particular creditor and the debtor, but generally; so that, if the court holds the composition to be good, it is good as to all the creditors, and if it holds the composition to be bad, then it is bad as to all the creditors.¹³⁴ The exercise of the jurisdiction is a matter of discretion, for the other courts ought not to be prevented from trying cases proper to be tried by them, unless there is some good reason for granting an injunction.¹³⁵ If the case arises before the debtor is in default in complying with the terms of the composition, the creditor will not be allowed to prosecute an action for the purpose of impeaching the whole composition—as, for instance, to have it declared void on account of some alleged concealment of assets;¹³⁶ but he will be allowed to proceed where the controversy is merely between himself and the debtor¹³⁷—as, for instance, whether he is bound by the composition when his name was not properly placed on the statement.¹³⁸ If he joins counts in tort with counts in contract, arising from the same cause of action, he will be restrained from prosecuting an action for a provable claim, but not for a non-provable claim.¹³⁹ In such case, if he desires to take any benefit under the composition, he must elect between the composition and the action at law.¹⁴⁰ If the debtor has been guilty of negligence in omitting to plead his discharge in an action at law, no relief will be granted against a judgment so rendered.¹⁴¹ If the debtor is in default in complying with the terms of the composition,

¹³⁴ *In re Thorpe*, L. R. 8 Ch. App. 743.

¹³⁵ *In re Thorpe*, L. R. 8 Ch. App. 743.

¹³⁶ *In re Thorpe*, L. R. 8 Ch. App. 743.

¹³⁷ *Ex parte Paper Staining Co.*, L. R. 8 Ch. App. 595.

¹³⁸ *Ex parte Paper Staining Co.*, L. R. 8 Ch. App. 595.

¹³⁹ *In re Samuel B. Tooker*, 14 B. R. 35.

¹⁴⁰ *Ex parte Baum*, L. R. 9 Ch. App. 673.

¹⁴¹ *Ex parte Baum*, L. R. 9 Ch. App. 673.

an injunction will not be granted, for the court will not enforce an agreement which he himself has failed to keep.¹⁴² The granting of an injunction is a matter of discretion, although there is an allegation of a default in complying with the terms of the composition, for it is the duty of the court to protect the debtor from being harassed by an action which is obviously and clearly unfounded. But if there is a substantial question to be tried, whether or not the terms of the composition have been complied with, an injunction will not be granted.¹⁴³ It has been said that there may be cases of accident where the court may feel bound to relieve the debtor from the effect of a default,¹⁴⁴ but in practice such relief has been given only where the creditor has done anything which makes it inequitable for him to enforce his strict legal right.¹⁴⁵ If an additional resolution is adopted after a default, a creditor who was bound by the original resolution will be restrained from prosecuting an action commenced after the default.¹⁴⁶

If the composition is to be paid in instalments, or at a future time, the debtor may plead the resolution in bar of an action brought before an instalment is due or any default has occurred.¹⁴⁷ But if an instalment is due, a plea of the resolution would not be good, under the English statute, unless there was also an allegation of payment *modo et forma*,¹⁴⁸ and the only ground on which it could be contended that the same principle did not hold good under our law would be that it has been affected by the provisions of the Revised Statutes (§ 5119) pertaining to the mode of pleading

¹⁴² *In re Hatton*, L. R. 7 Ch. App. 723; *Ex parte Peacock*, L. R. 8 Ch. App. 682; *In re Masters*, 33 L. T. (N. S.) 613.

¹⁴³ *Ex parte Lopez*, L. R. 5 Ch. Div. 65; *Ex parte Watson*, L. R. 2 Ch. Div. 63.

¹⁴⁴ *In re Hatton*, L. R. 7 Ch. App. 723.

¹⁴⁵ *Ex parte Peacock*, L. R. 8 Ch. App. 682; *Ex parte King*, L. R. 17 Eq. 332.

¹⁴⁶ *Ex parte Radcliffe Investment Co.*, L. R. 17 Eq. 121.

¹⁴⁷ *Slater v. Jones*, L. R. 8 Ex. 186.

¹⁴⁸ *Hazard v. Mare*, 6 H. & N. 435; *Fessard v. Mugnier*, 18 C. B. (N. S.) 286; *In re Hatton*, L. R. 7 Ch. App. 723.

a discharge. Whatever may be the technical mode of ascertaining the default—whether from the failure of the debtor to plead a compliance with the terms of the composition, or from a replication alleging it—yet, if it is ascertained, the creditor may maintain his action for the original debt, for the provision of the statute allowing him to enforce the composition in the bankrupt court is not exclusive, and does not prevent him, if he so elects, from resorting to the original cause of action.¹⁴⁹ A judgment in favor of the debtor on a plea averring a discharge by virtue of a resolution of composition is a bar to an action relying upon a default that had occurred before the entry of the judgment,¹⁵⁰ but not to a suit instituted on account of a default in the payment of an instalment that fell due after that time.¹⁵¹

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¹⁴⁹ *Edwards v. Coombe*, L. R. 7 C. P. 519; *Newell v. Van Praagh*, L. R. 9 C. P. 96; *Goldney v. Lording*, L. R. 8 Q. B. 182; *In re Hatton*, 7 Ch. App. 723; *Ex parte Peacock*, L. R. 8 Ch. App. 682.

¹⁵⁰ *Newington v. Levy*, L. R. 5 C. P. 607; L. R. 6 C. P. 180.

¹⁵¹ *Hall v. Levy*, L. R. 10 C. P. 154.

II. LIABILITY OF PUBLIC OFFICERS TO PRIVATE ACTIONS FOR NEGLECT OF OFFICIAL DUTY.

A public office is a public trust. The incumbent has a property right in it, but the office is conferred, not for his benefit, but for the benefit of the political society. The duties imposed upon the officer are supposed to be capable of classification under one of three heads: the legislative, executive, or judicial; and to pertain, accordingly, to one of the three departments of the government designated by these names. But the classification cannot be very exact, and there are numerous officers who cannot be classified at all under these heads. The reason will be apparent if we name one class as an illustration. Taxing officers perform duties which in strictness are neither executive nor judicial, though in some particulars they merely execute the orders of superiors, and in others they judge for themselves what is to be done. But sometimes, also, their duties partake of the legislative. All such officers are usually called administrative, while inferior executive officers are designated ministerial.

All offices are established and filled on public considerations, but some of the officers are expected to perform duties which specially concern individuals, and only indirectly concern the public. We may illustrate here by the case of sheriff. This officer serves criminal process, arrests and confines persons accused of crime, etc., but he serves civil process also. The nature of the duty suggests the remedy in case of neglect. If the duty neglected is a duty to the state, he is amenable to the state for his fault; while for the neglect of private duties, only the person who is injured may maintain suit. But, as a general thing, it is only against ministerial officers that an action will lie for breach

of duty. The reason generally assigned is that, in the case of other officers, it is inconsistent with the nature of their functions that they should respond in damages for failure in satisfactory performance. In many cases this is a sufficient reason, but in others it is inadequate.

If we take the case of legislative officers, their rightful exemption from liability is very plain. Let it be supposed that an individual has a just claim against the state which the legislature ought to allow, but neglects or refuses to allow. Here may be a moral, but can be no legal, wrong. The legislature has full discretionary power in all matters of legislation, and it is not consistent with this that the members should be called to account in the courts for their acts and neglects. Discretionary power is, in its nature, independent; to make those who wield it liable to be called to account by some other authority is to take away discretion and destroy independence. This is as true of inferior legislative bodies—such as boards of supervisors, city councils, and the like—as of state legislatures. The courts may put them in motion sometimes, when they neglect or refuse to act, but cannot require them to reach particular conclusions, nor visit them with damages because they do not. It is only when some particular duty of a ministerial character is imposed upon a legislative body, which its members are required to perform, and in regard to which no discretion is allowed them, that there can be a private action for neglect. Such duties are sometimes imposed upon subordinate boards, like supervisors or county commissioners, and their members made personally responsible for performance.

Passing to the class of executive officers, the rule is still the same. The governor of the state is vested with a power to grant pardons and reprieves, to command the militia, to refuse his assent to laws, and to take the steps necessary for the proper enforcement of the laws. But neglect of none of these can make him responsible in damages to the party suffering therefrom. No one has any legal right to be pardoned, or to have any particular law signed by the governor, or to have any definite step taken by the governor in the enforce-

ment of the laws. The executive, in these particulars, exercises his discretion, and he is not responsible to the courts for the manner in which his duties are performed. Moreover, he could not be made responsible to private parties without subordinating the executive department to the judicial department; and this would be inconsistent with the theory of our institutions. Each department, within its province, is independent.

Taking next the case of the judicial department, and still the same rule applies. For mere neglect in strictly judicial duties no action can lie. A judge cannot be sued because of delaying his judgments, or because he fails to bring to his duties all the care, prudence, and diligence that he ought to bring, or because he decides on partial views and without sufficient information. His selection for his office implies that he is to be governed in it by his own judgment; and it is always to be assumed that that judgment has been honestly exercised and applied. But, nevertheless, all judges may have duties imposed upon them which are purely ministerial, and where any discretionary action is not permitted. An illustration is to be found in our *habeas corpus* acts. These, generally, make it imperative that a judge, when an application for the writ is presented which makes out a *prima facie* case of illegal confinement, shall issue the writ forthwith; and the judge is expressly made responsible in damages if he fails to obey the law. A similar liability would arise if a justice of the peace were to refuse to issue a summons when it was lawfully demanded, or an execution on a judgment, and the like, because here the duty is merely ministerial.

But, although it is plain enough, in these cases of discretionary powers, that there should be no individual liability, there are many cases, in which the powers are not discretionary, where the exemption is equally clear. The reason based on the nature of the powers is, therefore, found to fail in these cases, and we must look for something further. And, looking further, we shall probably be able to find a general rule by which all cases may be determined. That rule seems to be this: that, if the duty which the official authority

imposes upon an officer is a duty to the public, a failure to perform it, or a wrongful performance, must be a public, not an individual, wrong; while if the duty is a duty to the individual, then a failure to properly perform it may give rise to an individual action.

Now, discretionary powers almost always impose only public duties. How plain this is in the case of the legislature. Members of any legislative body are not chosen to perform duties for individuals, but to perform duties to the state. The performance of these may benefit individuals, and the failure to perform them may prejudice individuals; but this is only incidental. Congress imposes taxes on some article of domestic and foreign manufacture; this benefits the home manufacturer, but the act is not supposed to be passed for his benefit, but for the benefit of the country. Congress passes an act removing taxes from another class of manufactures; this injures some one, but it violates no duty owing to any individual. The individual has no personal rights in the law whatever, and it is made or repealed without the necessity of considering his private interest in any manner. Congress passes a law allowing a private claim and ordering its payment; this benefits the claimant, but it is supposed to be passed in the interest of the whole country, and because it is for the public good that all just claims upon the nation should be recognized and provided for. If Congress should reject the claim, there is still the same presumption that the public interest has been consulted, and that the claim is rejected because it ought to be. In either case the duty imposed on the members of Congress—which was a duty to the public only—is supposed to have been performed.

So in the case of the judge. His doing justice as between two particular individuals, when they have a controversy before him, is not the end and object which were in view when his court was created and he appointed to a seat in it. Courts are created on public grounds; they are to do justice as between suitors, to the end that peace and order may prevail in the political society, and that rights may be preserved

and protected. The duty is public, and the end to be accomplished is public; the individual benefit or loss results from the proper and thorough, or improper and imperfect, performance of a duty for which his controversy is only the occasion. The judge performs his duty to the public by doing justice between individuals, or, if he fails to do justice between individuals, he may be called to account by the public, in such form and before such tribunal as the law may have provided. But the individual suffers no legal wrong from his neglect.

This principle does not apply exclusively to officers of high grade; it does not depend on the grade at all, but on the nature of the duty. This will appear if we take, as an illustration, the case of the policeman. His duty is to serve criminal warrants, to arrest persons who commit offences in his view, to bring night-walkers to account, and to perform various duties of a like nature. Within his beat he should watch the premises of individuals, and protect them against burglaries and arsons. But suppose he goes to sleep upon his beat, and, while thus off duty, a robbery is committed or a house burned down, neither of which could have happened had he been vigilant; who can bring him to account for this neglect of duty? Not the individual injured, certainly. He is not the policeman of the individual; he is not hired by him, paid by him, or controlled by him, and he owes no duty to him. The duty he owes is to the public—to the state, of which the individual member is only a fractional part, and incapable, as such, of enforcing rights which are not individual, but general. If a policeman fails to guard the premises of John Smith, the neglect is a breach of duty of exactly the same sort as when he fails to take John Smith to the lock-up for being drunk and disorderly; and if John Smith could sue him for the one neglect, so he could for the other. And it is proper to note here that in this instance the officer has not discretionary duties to perform, but those which are purely ministerial.

The same is true of officers having charge of the highways, and empowered to lay out, manage, and discontinue:

them. They may decline to lay out a road which an individual desires, or they may conclude to discontinue one which it is for his interest should be retained. There is a damage to him, but no wrong to him. In performing, or failing to perform, a public duty, an officer has touched his interest to his prejudice. But the officer owed no duty to him as an individual; the duty performed or neglected was a public duty. An individual can never be suffered to sue for an injury which, technically, is one to the public only; he must show some special wrong to himself, and damage alone does not constitute a wrong.¹

It may be said that the case of a highway commissioner who improperly opens or discontinues a road, to the prejudice of an individual, is like that of one who commits a public nuisance to the prejudice of an individual. In each case there is a public wrong and also a private damage. But the two cases differ in this: the common law imposes upon every one a duty to his neighbor, as well as to the public, not to make his premises a nuisance; but the duties imposed upon the road officer, in laying out and discontinuing roads, are to the public alone. Conceding that his action has failed to regard sufficiently the interests of individuals, still no private right of action is made out, because, there being no private duty, there is nothing for the individual to complain of except the breach of the public duty. But the state must complain of this, not individuals.

The classes of officers to whom the like principles apply are so numerous that we cannot pause to enumerate them all. One more may be mentioned. The quarantine officer is commanded to take certain steps to prevent the spread of contagion. He is culpable in a very high degree if he neglects so to do, because the duty is a public duty of the highest importance and value. He does neglect, and a thousand persons are infected in consequence. But not one of these persons can demand from the negligent officer a personal redress. The duty was laid on the officer as a public duty—

¹ *Waterer v. Freeman*, Hob. 266.

a duty to protect the general public ; but the office did not charge the incumbent with any individual duty to any particular person. If one rather than another was injured by the neglect, it was only that the consequences of the public wrong chanced to fall upon him rather than upon another ; just as the ravages of war may chance to reach one and spare another, though the purpose of the government is to protect all equally.²

But there are some offices which, though created for the public benefit, have duties devolved upon their incumbents which are duties to individuals exclusively. In other words, in these cases, instead of individuals being incidentally benefited by the performance of public duties, the public is to be incidentally benefited by the performance of duties to individuals. A case in point is that of the recorder of deeds. It is for the general public good that all titles should appear of record, and that all purchasers should have some record upon which they may rely for accurate information. But, although a public officer is chosen to keep such a record, the duties imposed upon him are usually duties only to the persons who have occasion for his official services. He is simply required to record, for those who apply to him, their individual conveyances, and to give to them abstracts or copies from the record if they ask for them and offer the legal fees. All these are duties to individuals, to be performed for a consideration ; the public do not commonly enforce them, nor do they commonly punish the failure in performance as a public offence. But the right to a private action on breach of the duty follows of course. The breach is a wrong, and injury from it is presumed.

² This case may be usefully compared with that of the inspector of meats in the public markets. The duties are imposed upon that officer, not only for the protection of the public in general, but for the protection of each individual purchaser in the market ; and, if one is injured by reliance upon the inspector, it may be admissible to hold the inspector liable to an individual suit. *Hayes v. Porter*, 22 Me. 37. See, also, *Couch v. Steel*, 3 El. & Bl. 402, in which an action against the master of a vessel for going to sea without medicines, contrary to law, was held sustainable by one injured by the want of them. See, also, *Curdos v. Bozant*, 1 La. An. 199.

Suppose the recorder refuses to receive and record a conveyance when handed to him with the proper fees; this is clear wrong, and, as such, is actionable. Suppose he undertakes to record it, and, in so doing, commits an error which makes the conveyance appear of record to be something different from what it is; this, also, is a wrong, for his duty is to record it accurately. In this last case the question of difficulty would be, who is entitled to maintain the suit; or in other words, who is the party that is wronged by the recorder's mistake.

The cases are not agreed on the question who should sustain the loss when the grantee in a deed has duly left it for record, and the recorder has failed to record it correctly. The question in such a case would commonly arise between the grantee in such a deed and some person claiming under a subsequent conveyance by the same grantor, which was first correctly recorded. In some cases it is held that the grantee in the first deed is not to be prejudiced by the recorder's error. The reason is thus stated by Breese, J.: The person seeking to take advantage of the error "is, in effect, claiming to enforce a statute penalty, imposed upon the grantee in the deed, by reason of his having omitted to do something the law required him to do to protect himself and preserve his rights. The law never intended a grantee should suffer this forfeiture if he has conformed to its provisions. The plaintiff claiming the benefit of this statute being, as it is in derogation of the common law, and conferring a right before unknown, he must find in the provisions of the statute itself the letter which gives him that right. To the statute alone must we look for a purely statutory right. Altho that this law required of the grantee in the deed was that he should file his deed for record in the recorder's office, in order to secure his rights under the deed. When he does that, the requirements of the law are satisfied, and no right to claim this forfeiture can be set up by a subsequent purchaser. The statute does not give to the subsequent purchaser the right to have the first deed postponed to his if the deed is not actually recorded, but only if it is not filed

for record."³ Here it is seen that the grantee in the deed has brought himself strictly within the letter of the statute, and has performed all that the statute, in terms, makes requisite for his protection.⁴

Where this doctrine prevails it is difficult to understand how the recorder can be responsible in damages to the grantee for anything more than has been paid him for making the erroneous record, unless, in consequence of something which subsequently takes place, an actual damage is suffered which can be shown. Such damage might, undoubtedly, befall if afterward he should negotiate a sale and find the erroneous record to stand in the way of its completion; but as the deed, if in existence, could be recorded over again on payment of the statutory fees, this cost would seem to furnish the measure of recovery. If, however, the deed were lost or destroyed, a second recording would be impossible, and the question of remedy might then be more serious. As the injury in such a case would result from the conjunction of two circumstances—first, the error in the record, and, second, the loss of the deed—the question of remote cause and proximate cause would be involved, and the conclusion might, perhaps, be that the proximate cause of damage was to be found in the subsequent facts, and not in the recorder's error.

On the other hand, there are many cases in which it has been decided that every one has a right to rely upon the record actually made as being correct, and that, if it is erro-

³ *Merrick v. Wallace*, 19 Ill. 486, 497. Substantially the same doctrine has been declared by *Drummond, J.*, in *Polk v. Cosgrove*, 4 Biss. 437, and *Riggs v. Boylan*, *ib.* 445. See, also, *Mim v. Mim*, 35 Ala. 23; *Garrard v. Davis*, 53 Mo. 322.

⁴ There are several cases in which it has been decided that the failure of the recorder to index a deed as required by the statute could not affect the title of the grantee. *Curtis v. Lyman*, 24 Vt. 338; *Commissioners v. Babcock*, 5 Oreg. 472; *Bishop v. Schneider*, 46 Mo. 472; *s. c.*, 2 Am. Rep. 533. But this, also, must depend upon the phraseology of statutes. See *Gwynn v. Turner*, 18 Iowa, 1. In general, the provisions on the subject of index are probably made for the convenience of examination of records, and not for the protection of those whose deeds are recorded. See *Schell v. Stein*, 76 Pa. St. 398.

neous, the peril is upon him whose deed has been incorrectly recorded. The leading decision to this effect was made under a statute which provided that "no mortgage should defeat or prejudice the title of any *bona fide* purchaser unless the same should have been duly registered"—a provision very different from that in the statute of Illinois already in substance given. A mortgage of \$3,000 was recorded as one of \$300; and Chancellor Kent said of the statute: "The true construction of the act appears to be that the registry is notice of the contents of it, and no more, and that the purchaser is not to be charged with notice of the contents of the mortgage any further than may be contained in the registry. The purchaser is not bound to attend to the correctness of the registry. It is the business of the mortgagee, and, if a mistake occurs to his prejudice, the consequences of it lie between him and the clerk, and not between him and the *bona fide* purchaser. The act, in providing that all persons might have recourse to the registry, intended ~~that~~ as the correct and sufficient source of information; and it would be a doctrine productive of immense mischief to oblige the purchaser to look, at his peril, to the contents of every mortgage, and to be bound by them when different from the contents as declared in the registry. The registry might prove only a snare to the purchaser, and no person could be safe in his purchase without hunting out and inspecting the original mortgage—a task of great toil and difficulty. I am satisfied that this was not the intention, and it certainly is not the sound policy, of the statute."⁵ Other cases to like effect are referred to in the note.⁶

Let us suppose that where such is the rule of law, a deed is so recorded that the record fails to describe the land

⁵ *Frost v. Beekman*, 1 Johns. Ch. 288, 298. And see *Beekman v. Frost*, 1 Johns. 544.

⁶ *Baldwin v. Marshall*, 2 Humph. 116; *Lally v. Holland*, 1 Swan. 306; *Sanger v. Craigie*, 10 Vt. 555; *Shepherd v. Burkhalter*, 13 Geo. 444; *Chamberlain v. Bell*, 7 Cal. 291; *Parrett v. Shaubhut*, 5 Minn. 323; *Scoles v. Wiley*, 11 Iowa, 261; *Miller v. Bradford*, 12 Iowa, 14; *Breed v. Conley*, 14 Iowa, 269; *Terrell v. Andrew County*, 44 Mo. 309; *Brydon v. Campbell*, 40 Md. 331. See *Kerr v. Russell*, 69 Ill. 666.

actually conveyed, and that the grantor sells the land a second time to one having no knowledge of the prior conveyance, thereby cutting off the first conveyance. There would be, under such circumstances, a direct loss to the first grantee of the whole value of the land, and it would seem that he must be entitled to a remedy against some one for a remuneration. That he might treat the second conveyance by his grantor as one made in his interest, and sue and recover from him the amount received from the second grantee, we should say would be clear. This would be only the ordinary case of one affirming a sale, wrongfully made by another, of his property, and recovering the proceeds thereof—the familiar case of waiving a tort, and suing in *assumpsit* for the money received.⁷ But in many cases such redress might be inadequate, because less than the value of the land was received on the second sale, and no reason is perceived why he might not sue in tort for the value of that which he has lost, if that promises more satisfactory redress. If one, knowing he has already conveyed away certain lands, gives a new deed which defeats the first, this is as gross and palpable a fraud as can well be conceived of; and, like the selling of property in market overt, though it may pass the title, it cannot protect the seller when called upon by the owner to account for the property the latter has been deprived of.⁸ But the question of a remedy against the recorder would, in this case, as well as that before suggested, be complicated as a question of

⁷ *Lamine v. Dorrell*, *Ld. Raym.* 1216; *Bennett v. Francis*, 2 B. & P. 554; *Read v. Hutchinson*, 3 Camp. 352; *Mann v. Locke*, 11 N. H. 248; *Smith v. Smith*, 43 N. H. 536; *Jones v. Hoar*, 5 Pick. 285; *Glass Co. v. Wolcott*, 2 Allen, 227; *Gilmore v. Wilbur*, 12 Pick. 124; *Webster v. Drinkwater*, 5 Me. 323; *Foster v. Tucker*, 3 Me. 458; *Bank of North America v. McCall*, 4 Binn. 374; *Willett v. Willett*, 3 Watts, 277; *Pearsoll v. Chapin*, 44 Pa. St. 9; *Morrison v. Rogers*, 3 Ill. 317; *O'Reer v. Strong*, 13 Ill. 688; *Guthrie v. Wickliffe*, 1 A. K. Marsh. 83; *Sanders v. Hamilton*, 3 Dana, 550; *Stearns v. Dillingham*, 22 Vt. 627; *Elliott v. Jackson*, 3 Wis. 649; *Fuller v. Duren*, 36 Ala. 73; *Pike v. Bright*, 29 Ala. 332; *Barlow v. Stalworth*, 27 Geo. 517; *Budd v. Hiler*, 27 N. J. 43; *Welch v. Bagg*, 12 Mich. 42; *Johnson v. Reed*, 3 Eng. 202; *Foye v. Southard*, 54 Me. 147; *Tamm v. Kellogg*, 49 Mo. 118.

⁸ See *Andrews v. Blakeslee*, 12 Iowa, 577; *Holmes v. Stout*, 10 N. J. 409.

proximate and remote cause, and would require a consideration which, up to this time, it has never, so far as we are aware, received. Does the loss of the estate result from the error of the recorder? or does that merely furnish the occasion for another event, to which the loss is in fact attributable as the proximate cause? The question would be still further complicated if, before the second conveyance by the original grantor, the first grantee had himself disposed of the land, so that the loss would fall, not upon the party whose deed was defectively recorded, but upon one claiming under him.⁹ Here the damage, instead of following directly the recorder's misfeasance, follows it only after two intermediate steps—a conveyance by the first grantee, and another by the first grantor, which has the effect to defeat it.

The recorder of deeds may also injure some person by giving him an erroneous certificate. The liability for this is clear if the giving of the certificate was an official act; otherwise not. It was an official act if it was something the person obtaining it had a right to call for, and which it was his duty to give. Thus, one has a right to call for copies to be made from the records, and for official statements of what appears thereon; and he is entitled to have these certified to him correctly. But he is not entitled to call upon the recorder for a certificate that a particular title is good or bad; and such a certificate, if given, would not be official. The reason for this is that a certificate to that effect must necessarily cover facts which the records cannot show; and a title may be good or be defective for reasons which cannot, under any recording laws, appear of record. Therefore, if the register certifies that a title is good, he only expresses an opinion on facts, some of which he may officially know, but others of which he cannot know as recorder, and, therefore, cannot officially certify to.¹⁰

But suppose the register's certificate to cover nothing he might not be required to certify officially, and, therefore, to be properly and strictly an official act, but incorrect, and

⁹ See *Ware v. Brown*, 2 Bond, 267.

¹⁰ Introduction to Cooley's Blackstone, p. xvii.

suppose the person who applies for and receives it is not injured by it, but a subsequent purchaser, to whom he has delivered it with his title deeds, is injured—has such subsequent purchaser a right of action against the recorder? In other words, as it is a duty the recorder owes to every one who may have occasion to rely upon his records, to see that they are correctly made, is it also his duty to every one who may have occasion to rely upon his certificates, to see that they are correct also?

The difference between the two cases may be said to be this: that the records are for public and general inspection, and are required to be kept that all persons may have, by means of them, accurate information concerning titles, while the giving of a certificate concerning something recorded is a matter between the recorder and the person calling for it, and legally concerns no one else. The recorder knows that his records are to be seen, and titles to be made in reliance upon them; he is not bound to know that his certificate is for the use or reliance of any but the person who receives it, nor can he be supposed to give it for any other use. But, on the other hand, it may be replied that such certificates are usually obtained as satisfactory evidence of title in making sales, and they are expected to have their effect, not upon the person who receives them, but upon some one to whom, by means thereof, he may be enabled to effect a sale, or from whom he may obtain a loan. It is such a person, therefore, that may be supposed to be in view when the certificate is obtained, and an injury, if any occurs, would be likely to fall upon him, rather than upon his grantor or mortgagor. If, therefore, the erroneous certificate of the register would, as has been said, "make him liable to the party who has been injured by it,"¹¹ must it not make him liable to the party who, in reliance upon it, has been induced to deal with the title, rather than to one who, by means of it, has been enabled to realize or accomplish more than his real title would justify.¹²

¹¹ Agnew, J., in *Schell v. Stein*, 76 Pa. St. 398, 401.

¹² In *Housman v. Girard Building, etc., Association*, to appear in 81 Pa. St., the supreme court of Pennsylvania has recently decided that, for a false

The case of a postmaster may be instanced as that of an officer who owes duties both to the public and to individuals. In the main, his duties are to the public: he is to receive and forward mail to other offices; to keep correct accounts with the department, and, perhaps, with contractors; to draw money orders, etc. But, in respect to mail matter received at his office, at a certain stage a duty is fixed upon him in behalf of individuals. When the proper person calls for anything which is there for delivery, he must deliver it, and he is guilty of an actionable wrong if he refuses.¹³ He would be liable also if, through his carelessness, the letter of an individual should be lost or destroyed while in his charge; nor is any reason perceived why the carrier would not be equally liable if, through his fault, a mail should be lost.¹⁴ There is a separate and distinct duty as to each paper, letter, or package carried, and a breach occurs if, through negligence, any one fails to be safely carried and safely delivered.¹⁵

So the collector of customs owes to the merchant, whose goods pass through his hands, the obligation to appraise or inspect them with reasonable promptness, and deliver them on the duties being paid. A merchant might be ruined by needless delays in the performance of this duty, and the responsibility should be unquestionable.¹⁶

The case of judges of election is one in which duties to the public and to individuals are so united and combined

certificate of searches, the recorder of deeds is liable only to the party who employs him to make it. In that case the certificate was obtained by a party contemplating a loan on the property, and who actually made a loan, relying on the certificate, and was injured thereby.

¹³ *Lane v. Cotton*, Salk. 17; *Smith v. Powdich*, Cowp. 182; *Rowning v. Goodchild*, 2 W. Bl. 908; *Teale v. Felton*, 1 N. Y. 537; *s. c.*, in error, 12 How. 284.

¹⁴ *Ford v. Parker*, 4 Ohio (N. s.), 576; *Maxwell v. McIlvoy*, 2 Bibb, 211; *Sawyer v. Corse*, 17 Gratt. 230.

¹⁵ *Whitfield v. Le Despencer*, Cowp. 754, 765.

¹⁶ See *Barry v. Arnaud*, 10 Ad. & El. 646, 670. A supervisor, required by law to report a claim to the county board for allowance, is liable for neglect to do so, though in good faith he may believe the law invalid, and refuse on that ground. *Clark v. Miller*, 54 N. Y. 528.

that the question of remedy is often one of no little difficulty. The duty to hold the election, to manage it fairly, and to receive the votes of all qualified electors, is one imposed for the general interest of the state, and concerns its highest welfare. But its performance also concerns the individual; for the privilege of taking part in the electoral machinery of the state is supposed to be of great value to every elector, and, from the time of *Ashby v. White*,¹⁷ it has been regarded as settled law that an action for damages might be maintained for a wrongful refusal by the officers to receive the elector's vote. The differences in the decisions have related to the circumstances under which the suit might be brought. If, as is the case in some states, the oath of the elector is made the test of his right to vote, it is conceded that an action will lie if the oath is taken and the vote refused;¹⁸ and in some states it is held that, if the right depends on qualifications of which the election officers must judge, they will, nevertheless, be liable for a refusal to receive the vote, though no corruption be charged against them.¹⁹ But in other states the usual protection which is given to judicial officers is extended to these, and they are held liable for depriving the elector of his privilege only where malice or corruption is charged and established against them.²⁰

¹⁷ 2 *Ld. Raym.* 938; *s. c.*, 1 *Smith's Ld. Cas.* 246.

¹⁸ *Spraggins v. Houghton*, 3 *Ill.* 377; *State v. Robb*, 17 *Ind.* 536; *Gillespie v. Palmer*, 20 *Wis.* 544; *People v. Pease*, 30 *Barb.* 588; *Goetchins v. Mathewson*, 61 *N. Y.* 420.

¹⁹ *Lincoln v. Hapgood*, 11 *Mass.* 355; *Henshaw v. Foster*, 9 *Pick.* 312; *Capen v. Foster*, 12 *Pick.* 485; *Blanchard v. Stearns*, 5 *Metc.* 298; *Harris v. Whitcomb*, 4 *Gray*, 433; *Jeffries v. Ankeny*, 11 *Ohio*, 372; *Monroe v. Collins*, 17 *Ohio (N. s.)*, 665; *Anderson v. Milliken*, 9 *Ohio (N. s.)*, 568.

²⁰ *Jenkins v. Waldron*, 11 *Johns.* 114; *Wecherley v. Guyer*, 11 *S. & R.* 35; *Gordon v. Farrar*, 2 *Dougl. (Mich.)* 411; *Peavey v. Robbins*, 3 *L. Jones*, 339; *Caulfield v. Bulloch*, 18 *B. Mon.* 494; *Miller v. Rucker*, 1 *Bush*, 135; *Chrisman v. Bruce*, 1 *Duv.* 63; *Wheeler v. Patterson*, 1 *N. H.* 88; *Turnpike v. Champney*, 2 *N. H.* 199; *Rail v. Potts*, 8 *Humph.* 225; *Bevard v. Hoffman*, 18 *Md.* 479; *Elbin v. Wilson*, 33 *Md.* 135; *Friend v. Hamill*, 34 *Md.* 298; *Pike v. Megoun*, 44 *Mo.* 492. See *State v. Daniels*, 44 *N. H.* 383, and *Goetchins v. Mathewson*, 61 *N. Y.* 420. In this last case the whole subject is fully and carefully examined, and the authorities analyzed.

But the mere failure or refusal to receive a vote when offered is only one of many ways in which an elector's right to have a voice in an election may be defeated. The following may be suggested:

The defeat of an election by the officer's failing to take some necessary preliminary action.

Permitting illegal votes to control the election.

Destruction of the ballots after they are received.

Falsely returning the result, whereby the majority are deprived of their rights.

In every one of these cases the legal voter who has sought to exercise his privilege and has failed, or who, after exercising it, has had his action nullified by the election officers, has suffered palpable wrong, the same in sort and degree as when his individual vote is wrongfully rejected. But there is no precedent of an action for an individual injury of this sort. The precedents go no further than this: to fix upon the election officers the duty, to the individual, to register his name—if registry is required—at the proper time and place if he presents himself, and to receive his vote if it is tendered when the polls are open for the purpose. Any further duty which these officers owe is a duty to the aggregate public, and the injury which one citizen suffers from failure to perform it is the same with that suffered by every other citizen similarly situated, and, therefore, as in the case of public offences which touch the general public alike, the neglect cannot support an individual action. If an election has actually taken place, and the officers attempt to deprive the person elected of his office, by false returns or otherwise, the law will afford him a remedy for the recovery of the office. But if an election has been prevented, it is not supposed possible to ascertain what the result would have been had it taken place, and, consequently, no individual redress is possible. The public is wronged, and, in a legal view, only the public.

There are many cases in which it has been decided that, in the case of specified public officers, the only duty they owed to individuals was to act with good motives and integ-

ity, but that an action would lie against them where malice and injury to an individual were the impelling motives of their conduct. Thus, members of a school board have been held liable for the malicious removal of a teacher.²¹ So, a county clerk, it is said, may be held liable, to the party injured, for wilfully and maliciously approving an insufficient appeal bond.²² In New Hampshire it is said that "surveyors of highways are liable in damages for any wanton, malicious, or improper acts in making and repairing highways;"²³ a very general statement, which we should suppose might require some qualification. Undoubtedly, if what the surveyors do amounts to a trespass, as where they throw surface waters upon adjoining lands, the party injured is entitled to his remedy, whether the motive to their action was good or bad; but it cannot always be true that a party dissatisfied with the repair of a highway which is entrusted to a board of public officers can charge malice as a ground for a private action. He should be able to show how his own estate is unnecessarily interfered with, or that its enjoyment is purposely diminished in a manner that makes his case exceptional.²⁴ In Connecticut it is held that a wharfmaster may be liable to a party injured by his order for the removal of a ship from a certain dock, if it could be shown that the order was given with a malicious purpose to cause injury.²⁵ But our own view is that the doctrine that a public officer, acting within the limits of his jurisdiction in the discharge of a discretionary duty, can be held liable upon an assumption that he has acted wilfully or maliciously, is an exceedingly unsatisfactory and dangerous one; and that those decisions are safest, and most consonant to public policy, which deny it

²¹ *Burton v. Fulton*, 49 Penn. St. 157. See *Hogga v. Bigley*, 6 Humph. 236; *Walker v. Hallock*, 32 Ind. 239; *Lilienthal v. Campbell*, 22 La. An. 600; *Harman v. Tappenden*, 1 East, 555.

²² *Billings v. Lafferty*, 31 Ill. 318. See *Chickering v. Robinson*, 3 Cush. 543; *Tompkins v. Sands*, 8 Wend. 462.

²³ *Rowe v. Addison*, 34 N. H. 306, 313.

²⁴ See *Waldron v. Berry*, 51 N. H. 136, where the New Hampshire and other cases are collected and analyzed.

²⁵ *Gregory v. Brooks*, 37 Conn. 365. See *Brown v. Lester*, 21 Miss. 392.

altogether. Motives are not always readily justified to the public, even in the cases where they have been purest; and the safe rule for the public is that which protects its officers in acting fearlessly, so long as they keep within the limits of their legal discretion.²⁶

It has been decided in New York that a superintendent of canal repairs, who, having the means to make repairs, and being charged with the duty to do so, neglected to perform the duty, was liable for the damages of a party whose use of the canal was prevented or impeded in consequence.²⁷ But here the duty was imperative, and was not left to the officer's discretion. In the same state commissioners of highways who have funds for the repair of the public ways, but neglect to use them for the purpose, are, on like grounds, responsible to parties injured by the want of repair.²⁸ The duty in such cases is not discretionary, but imperative. It is also distributive—imposed for the benefit of the public, and also of each individual of the public who may have occasion to make use of the public ways; in that particular corresponding to the duty imposed upon railway companies to sound signals at street-crossings, as a warning to each individual who may have occasion to be passing that way.

The case of a sheriff is that of an officer upon whom the law imposes duties to individuals as well as to the public. In so far as he acts as a peace officer, individuals are concerned only that he shall commit no trespass upon their rights; but in the service of civil process he is charged with duties only to the parties to the proceedings. These he must perform at his peril, and although in many cases the duties are of great nicety, and require an investigation into

²⁶ See *Sage v. Laurain*, 19 Mich. 137. The case of assessors charged with malicious over-valuation is in point here, and the decisions which hold that they cannot be held liable seem to us right beyond question. *Weaver v. Devendorf*, 3 Denio, 117; *Cooley on Tax*. 552.

²⁷ *Adsit v. Brady*, 4 Hill, 630; *Robinson v. Chamberlain*, 34 N. Y. 389; *Insurance Co. v. Baldwin*, 37 N. Y. 648.

²⁸ *Hover v. Barkhoof*, 44 N. Y. 113. Compare *Garlinghouse v. Jacobs*, 29 N. Y. 297; *Lynn v. Adams*, 2 Ind. 143; *Dunlap v. Knapp*, 14 Ohio (N. S.), 64.

the facts, and the exercise of sound judgment and discretion, yet he is looked upon as a ministerial officer merely, and is supposed to be capable of ascertaining, beyond mistake, what his duty is, and of performing it correctly. The law, therefore, does not excuse his errors, though he may have been led into them honestly while endeavoring faithfully to perform his duty. A striking illustration of the severity of this rule may be found in the case where an identity of names leads him to serve his writ upon the wrong party;²⁹ or where he seizes the goods of the wrong party, but on such evidence as might have misled any one.³⁰ The same act or neglect of a sheriff may sometimes afford ground for an action on behalf of each party to the writ; as where, having levied upon property, he suffers it to be lost or destroyed through his negligence. In such a case the plaintiff may be wronged because his debt may be lost, and the defendant may be wronged because a surplus that would have remained after satisfying the debt is lost to him. The officer owed to each the duty to keep the property with reasonable care, and there is a breach of duty to each if he has failed to do so.³¹

The purpose of this paper being merely to indicate general rules, and not to go into particulars, the case of another class of officers may be referred to by way of illustration. We allude now to those whose duty is to cut drains for the draining of considerable tracts of land, and afterwards to keep them open for the public benefit. The position, duty, and responsibility of such officers, it may be well to say at the outset, are not always the same. Sometimes they constitute a corporate board, and then the act of one, if lawful,

²⁹ *Jarmain v. Hooper*, 6 M. & G. 847.

³⁰ *Davies v. Jenkins*, 11 M. & W. 755; *Dunston v. Patterson*, 2 C. R. (N. S.) 495.

³¹ *Jenner v. Joliffe*, 9 Johns. 381, 385; *Bank of Rome v. Mott*, 17 Wend. 554; *Bond v. Ward*, 7 Mass. 123-129; *Purrrington v. Loring*, 7 Mass. 388; *Barrett v. White*, 3 N. H. 210-224; *Weld v. Green*, 10 Me. 20; *Franklin Bank v. Small*, 24 Me. 52; *Mitchell v. Commonwealth*, 37 Pa. St. 187; *Hartlieb v. McLane*, 44 Pa. St. 510; *Gilmore v. Moore*, 30 Geo. 628; *Banker v. Caldwell*, 3 Minn. 94; *Tudor v. Lewis*, 3 Metc. (Ky.) 378; *Abbot v. Kimball*, 19 Vt. 551; *Fay v. Munson*, 40 Vt. 468.

is the act of the corporation. Sometimes they are officers of cities or villages, and then their acts are the acts of the municipal corporation that elects or appoints them, and may render such corporation liable. But sometimes they act directly under an independent statutory authority, subordinate to no corporation, so that their neglects are chargeable to no one but themselves as individuals. This last is the position usually occupied by persons chosen as drain commissioners by towns, counties, or other districts of territory; they are chosen by the voters of the district, because the statute prescribes that mode of selection, but they act independently of the people of the district afterwards.

There are various ways in which the failure of such an officer to perform his duties faithfully and promptly might result in damage or loss to individuals. *First*, it might delay the completion of a work which had been ordered, and thereby land might be left overflowed and useless which should have been drained. But it is impossible to count upon this as an individual injury, since what is lost is only an advantage the party expected to reap from an exercise of public authority—not something which has actually become his. It is to be compared to the loss, by a candidate, of an anticipated election, in consequence of a riot at the polls, or through fraudulent votes; it may be a hardship, but it can support no action, because it takes away only an uncertain expectancy, and not a vested right. It may also be compared to the case of one who is a deserving object of charity under the poor laws. Such a person, from his circumstances, may have a right to expect relief from the proper officer, and it will be the duty of the officer to give it if the case is deserving. But the officer's neglect cannot give a private right of action; for until something has, in some legal way, been specifically set apart for the pauper, so that in law it has become his property, he can have no legal right which the officer's neglect defeats. And so up to the time when, by the construction of a drain, individual rights have actually attached, the delay of the commissioner, in the view of the law, can be a matter only of public concern—not a private injury.

But when the drain is made, the benefits to private estates arise, or should arise, and then there may be complaint either, *first*, that the plan or execution of the work has not brought the benefit it should have brought; or, *second*, that by neglect of the officer the drain is impeded. In the first case there can be no right of action, because as yet everything is in expectancy. But if, when the drain is completed, it is suffered by negligence to be obstructed, and thereby private estates are injured, the right to redress by suit seems clear. There is a distinct duty incumbent upon the officer who is charged with keeping the drain open, which he owes to every person who would be injured by his neglect; and where damage concurs with a breach of this duty the right of action is complete. But this, of course, supposes the means in his hands for the purpose, as without this there can be no neglect.³²

It has been said in a recent treatise of accepted value that "the liability of a public officer to an individual for his negligent acts or omissions in the discharge of an official duty depends altogether upon the nature of the duty as to which the neglect is alleged. Where his duty is absolute, certain, and imperative, involving merely the execution of a set task—in other words, is simply *ministerial*—he is liable in damages to any one specially injured, either by his omitting to perform the task, or by performing it negligently or unskilfully. On the other hand, where his powers are discretionary, to be exerted or withheld according to his own judgment as to what is necessary and proper, he is not liable to any private person for a neglect to exercise those powers, nor for the consequences of a lawful exercise of them, where no corruption or malice can be imputed, and he keeps within the scope of his authority."³³ But, if this is correct as a general rule, it is subject to a great many exceptions; for,

³² This general principle is recognized by the following among many other cases: *Parker v. Lowell*, 11 Gray, 353; *Childs v. Boston*, 4 Allen, 41; *Barton v. Syracuse*, 37 Barb. 292; *Wallace v. Muscatine*, 4 Greene (Iowa), 373; *Phillips v. Commonwealth*, 44 Pa. St. 197; *Hover v. Barkhoof*, 44 N. Y. 113.

³³ *Shear. & Redf. on Neg.* § 156.

as is above shown, there are many cases in which the duty is absolute, certain, and imperative, and is also ministerial in which no action will lie, because the duty is exclusively public. The case of election officers defeating an election is a conspicuous instance; the voters who lose the opportunity to deposit their ballots are allowed no private right of action, though their damage is the same, in kind and degree with that of voters whose ballots are wrongfully refused when the polls are open. The reason we have already stated to be this: that the duty to prepare for and hold an election is a public duty exclusively, while the duty to receive ballots when the polls are open is one severally due to each individual elector. There are also numerous cases in which duties are entrusted to the judgment and discretion of officers, and where, nevertheless, actions are sustainable against them. We have referred to some of these. It is true, the decisions regarding them are not harmonious—some courts holding that the obligation the officer owes to the individual is only to discharge his duty with integrity and to his best judgment, and that he is liable to an action only when malice or corruption is established, while others admit some exceptions, and hold, especially in election cases, that the officer must, at his peril, concede to the individual his legal rights.³⁴ The true general rule, we conceive, may be stated thus: whenever an individual can show that he suffers an injury through the neglect of a public officer to respect and recognize some right which the law assures to him, he is entitled to some appropriate redress therefor; while for incidental loss which he may suffer in consequence of the neglect of purely public duties, he is entitled to no redress, because no right pertaining to him as an individual has been violated. And this is wholly independent of the circumstance that his loss or damage is or is not exceptional and special.

T. M. COOLEY.

ANN ARBOR, MICH.

³⁴ *Lincoln v. Hapgood*, 11 Mass. 350. Compare *Tozer v. Child*, 7 El. & Bl. 377.

III. ASSIGNMENTS BY CORPORATIONS FOR THE BENEFIT OF CREDITORS.

On the 25th day of August last the State Savings Institution, of Chicago, with 14,000 depositors and an aggregate of \$3,000,000 of savings deposits, executed, through its president, D. D. Spencer, and its secretary, A. D. Guild, a secret assignment, to Abner Taylor, of all its property, real and personal, for the benefit of its creditors. On the 26th Spencer and Guild absconded, and sought a refuge on foreign soil. On the 28th the board of directors, or trustees, of the bank passed a resolution approving the assignment, which was then delivered to Taylor, who forthwith took possession of the banking-house and property. An examination of the affairs of the ruined bank, by a committee of prominent citizens, showed the aggregate value of all the remaining assets of the corporation to be less than \$1,000,000. It showed the grossest fraud and embezzlement by the departed Spencer, the Merdle of American finance, and a passive acquiescence therein on the part of the trustees. On the 18th of September the Hon. E. S. Williams, one of the judges of the circuit court of Cook county, sitting in chancery, appointed a receiver of the property of the bank, upon a bill filed by depositors; directed Taylor, the assignee, to surrender possession to the receiver thus appointed; and enjoined further proceedings under the pretended assignment. The recognized standing of Judge Williams as a profound and accomplished chancellor, his prompt and fearless action in this case, and the great public interest attaching to it from first to last, render it worthy of more than the passing notice usually accorded decisions at *nisi prius*.

May a corporation, under such attendant circumstances of fraud, mismanagement, and abandonment of trust by its offi-

cers, execute a general assignment for the benefit of its creditors? And may equity interfere, in such case, by the appointment of a receiver? A glance at the existing state of the authorities may aid in a proper solution of the questions here suggested.

The right of an ordinary commercial corporation, occupying no relation of trust toward its creditors, to execute, in the absence of fraud, a general assignment of all its property to a trustee for the payment of its debts, is, of course, too well established to admit of question. The doctrine, as stated by Kent, is that a corporate body, as well as a private individual, when in failing circumstances and unable to redeem its paper, may, upon general principles and in the absence of any statutory authority, assign its property to a trustee, in trust, to pay its debts, and distribute as directed. And the power of the corporation in the disposition of its property for the payment of its debts is regarded by Kent as unlimited. 2 Kent's Com. 315, note *g*. While the authorities cited by the learned author in support of the proposition hardly bear him out in his assertion of the unlimited extent of the power, yet, upon the general proposition, they are nearly uniformly in the affirmative.

A leading case is that of *DeRuyster v. The Trustees of St. Peter's Church* (3 Barb. Ch. 119), decided by Chancellor Walworth in 1848, and affirmed by the court of appeals (3 N. Y. 238). By an act of the legislature of New York the trustees of St. Peter's church were authorized to dispose of the real and personal estate of the corporation for the benefit and advantage of the church and congregation, with the concurrence of the chancellor first had, in the manner specified by the act for the incorporation of religious societies. The trustees of the corporation executed an assignment of all its property, real and personal, to assignees for the payment of all debts ratably—a petition being presented to the vice-chancellor, and an order obtained authorizing such assignment. The case turned upon the validity of this assignment, and it will thus be observed that the direct question involved was dependent somewhat upon the statu-

tory authority to which reference has been made. Chancellor Walworth, however, discusses the question upon general principles, as well as affected by the statute in question, and his learned and luminous opinion presents a masterly review of all the authorities. Upon a previous occasion he had expressed an opinion adverse to the validity of such an assignment, but he here very frankly changes front, and asserts, in emphatic terms, the power of a corporation to thus assign. "It appears," he says, "to be settled by a weight of authority which is irresistible that a corporation has a right to make an assignment, in trust, for its creditors, and may exercise that right to the same extent, and in the same manner, as a natural person, unless restricted by its charter or by some statutory provision" (p. 124). A distinction might well be taken between religious and commercial corporations, and an additional ground be asserted in support of the right to thus assign in the former class, in that the trustees of a religious corporation are usually the corporation itself, there being no share-holders. But the distinction seems to have escaped the notice of the courts and writers upon this subject, and the right to assign is asserted irrespective of the nature of the corporation.¹

But the doctrine thus definitely established was not attained by an unbroken line of authority, and ten years earlier grave doubts were expressed of the correctness of the principle, and by no less an authority than Mr. Justice Story, in *Beaston v. The Farmers' Bank of Delaware*, 12 Pet. 102, decided in 1838. The case arose upon the construction of the act of Congress of 1797, chapter 74, section 5. That section provided that, when any person indebted to the United States should become insolvent, the debt due to the United States should be first satisfied; and that the priority thus established should be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his debts,

¹ Among the many cases decisive of the same principle may be noticed *Union Bank of Tennessee v. Ellicott*, 6 Gill & J. 363; *State of Maryland v. Bank of Maryland*, 6 Gill & J. 205; *Town v. Bank of River Raisin*, 1 Dougl. (Mich.) 530; *Robins v. Embry*, Smed. & M. Ch. 207.

should make a voluntary assignment thereof, as to other cases enumerated. And one of the questions presented to the court was whether a corporation was a person within the meaning of the act, and hence capable of assigning for the benefit of its creditors. Story dissented from the decision of the court, in one of his luminous opinions which sometimes shed as much of the light of clear judicial reasoning upon the subject under discussion as the opinion of the majority of his brethren. He observes (page 138): "I must say that, independent of some special and positive law or provision in its charter to such an effect, I do exceedingly doubt if any corporation, at least without the express assent of all the corporators, can rightfully dispose of all its property by such a general assignment, so as to render itself incapable in future of performing any of its functions. That would be to say that the majority of a corporation had a right to extinguish the corporation by its own will and at its own pleasure. I doubt that right, at least unless under very special circumstances." Although the judgment of the court was adverse to the position of Story, the judges seem to have been pretty evenly divided in opinion. Story states in his dissenting opinion that Mr. Justice Barbour, he knew, held the same opinion with himself, but that his departure from the court, before the opinion in the case was pronounced prevented him from speaking in his behalf. Mr. Justice McLean also concurred with Story. Mr. Justice Baldwin also concurred with Story in his dissenting opinion, but with the majority of the court in their judgment—a sort of judicial somersault worthy of note only in that the judgment and the dissenting opinion seem to be utterly irreconcilable. The views here expressed by Story are cited with approbation by Brice in his recent and learned treatise upon the doctrine of *Ultra Vires*, second edition, page 167.

The opinion expressed with such extreme caution by Story in the case last cited, was more emphatically asserted by Chancellor Farnsworth, of Michigan, at about the same time in *Bank Commissioners v. Bank of Brest*, Harr. (Mich.) 106. It was there held that the directors of a bank in an insolvent

condition could not make a general assignment of all its effects to a trustee for the benefit of creditors. Conceding the power of a banking corporation to transfer a portion of its assets as security for the performance of its obligations, the chancellor held it to be beyond the power of the directors to make a general assignment without authority from the stockholders, since such an assignment, if upheld, would operate as a surrender of the charter, and an abandonment of the franchise. And the directors, being trustees of the shareholders for the purpose of carrying on the business of the corporation, are not empowered with the suicidal function of terminating its corporate existence. But this case was much shaken, if not overruled, by the subsequent case, decided by the supreme court of the state, of *Town v. Bank of River Raisin*, 2 Dougl. (Mich.) 530. The latter case, decided in 1847, asserts the general doctrine in accordance with the views of Kent and Walworth above cited. And, with some exceptions such as those noted, the almost uniform current of authority supports the proposition that an ordinary commercial corporation may, in the absence of fraud, assign its property generally for the benefit of its creditors.

It would be a Quixotic undertaking to attempt the overthrow, at this late day, of a doctrine so firmly implanted in American jurisprudence, and supported by the names of so many eminent jurists. But it may be permissible to indicate an apparent, if not real, absurdity growing out of this doctrine. While asserting the right of a corporation to thus divest itself of everything partaking of the nature of property, and to denude itself of every element necessary to its continued operation, the courts have jealously insisted upon the retention of the franchise, holding that to be capable of surrender only by the action of the courts, or by consent of the legislature whence it came. Thus, in *State of Maryland v. Bank of Maryland*, 6 Gill & J. 230, the court, *arguendo*, insist that, although a corporation should, by a transfer of all its property, render itself powerless to discharge the ordinary purposes of its institution, it still remains an entity—a living corporation. So, in *Town v. Bank of River*

Raisin, 2 Dougl. (Mich.) 530, it is insisted that the transfer or assignment of its property does not, necessarily, dissolve the corporation, and is not, *ipso facto*, a surrender of its franchise, but affords, at the most, only ground for forfeiture by reason of misuser or non-user. The same distinction runs through most of the decisions which assert the right of a corporation to divest itself of all its property by means of a general assignment for the benefit of creditors. Giving, perhaps, undue prominence to the fundamental American idea that the charter, when accepted, becomes a contract between the state and the corporation, the courts have sanctioned the divestiture by corporations of their every attribute or function of corporate action, while still asserting it to be necessary, in order to a dissolution, that the consent of both contracting parties should be obtained, or that a judicial proceeding should be had by information in the nature of a *quo warranto* to declare a forfeiture of the franchise and a dissolution of the body corporate.

While the distinction is well taken in point of law, it is a distinction without difference. The substance is taken, the shell is left. The naked franchise alone remains—the right to do corporate business under a corporate name. Denuded of every agency through which a corporation can operate, the phantom corporation still lives, a sort of *ignis fatuus*. It is idle for courts and judges to waste time on such visionary distinctions. Their absurdity is apparent in the fact that the act of the corporation in thus assigning all its property is upheld by the courts as a valid assignment, while the non-user of the franchise, which necessarily follows the deprivation of all the agencies through which alone it can be exercised, results in judgment of forfeiture on proceedings in *quo warranto*. The same act is thus held to be legal and illegal at one and the same time. Such was the actual result in the case of the Real Estate Bank of Arkansas, which, in 1842, made a general assignment of all its property in trust for the payment of its creditors. In *Conway et al., ex parte*, 4 Ark. 302, and in *Ringo v. Biscoe et al.*, 13 Ark. (8 English) 563, this assignment was declared to be

valid and legal, while in *The State v. The Real Estate Bank*, 5 Ark. 595, the same assignment was held to operate as a forfeiture of the charter, entitling the state to a surrender of the franchise. A more striking illustration of the absurdity of such judicial hair-splitting can scarcely be imagined.

Thus much by way of prologue to the case of *Eames v. The State Savings Institution*, and as outlining the existing state of the law upon the right of a corporation to execute an assignment for the benefit of its creditors *pari passu*. Conceding the general question under discussion to be thus affirmatively settled by the authorities, it is believed that the decision of Judge Williams, in granting an injunction and appointing a receiver in this case, is not inconsistent with the principles above discussed, and that a review of the case will show that the conclusion reached by the learned chancellor is based upon well-established and uniformly-recognized principles of equity.

The fundamental theory of the case of *Eames v. The State Savings Institution* is the relation of trust between the officers of a savings bank and its depositors. The bill filed by savings depositors alleged that the trustees and officers of the bank were trustees of the depositors for the safe management and return of their deposits; that the bank, by its president and secretary, executed an assignment of all its property to Taylor, the officers and trustees immediately delivering possession thereunder of all the property, including the banking-house and the accounts of depositors, and thereupon abandoned the same, the president and cashier departing from the country; that the trustees and officers, for a long period prior to such abandonment of their trust, had been guilty of gross mismanagement, and had suffered the assets and deposits of the bank to be wasted and misapplied; that the assignment was void for want of authority in the trustees and officers of the bank to abandon their trust without consent of all persons interested in its execution, or the order of a competent court; that the bank had wholly abandoned and discontinued its business, and its banking-house was closed; that the trustees, being stockholders, had

shortly before the assignment surrendered up and transferred to the company their shares of stock, taking out of the assets of the bank their own notes and other securities; and that the indebtedness of Spencer, the absconding president, to the bank amounted to about half a million dollars. It prayed an injunction against further proceedings under the assignment, and the appointment of a receiver.

The motion was sustained after a full argument, turning chiefly upon the question of the jurisdiction of a court of equity to interfere upon the facts stated. Indeed, it was conceded by counsel opposing the motion that, if the court had jurisdiction, the case was a fitting one for the appointment of a receiver. The question of jurisdiction seems to have been determined largely by the statute of Illinois,*

* The following is the opinion of the court: Williams, J.—The bill in this case asserts the execution of the assignment of all the assets of the bank, including its banking-house, to Taylor; the transfer to the bank by the stockholders, immediately before the assignment, of two thousand shares of stock, and the delivery of the bank to the assignee; the abandonment of the same by the officers of the bank; and the departure of the president and cashier. It alleges that, before the assignment and abandonment of their trusts by the officers of the bank, they had been guilty of gross mismanagement of their trusts, and had wasted and misapplied the assets of the bank, and claims that on account of the abandonment of their trusts, and the attempted transfer of the trust estate to Taylor, some fit person should be appointed to be the receiver of the estate. The allegations of the bill are such as would warrant the appointment of a receiver had no assignment been made; but it is said that the bank had a right to make a general assignment for the benefit of its creditors, and, having made it, the court ought not to take jurisdiction of the estate. The right of corporations to make *bona fide* assignments for the benefit of creditors must be admitted. But the right of courts of equity, "on good cause shown, to dissolve or close up the business of any corporation, to appoint a receiver therefor," who shall have full power and authority to sue in all courts and do all things necessary in closing up the affairs of the corporation, is expressly conferred by the statute of this state. The good cause referred to in the statute is shown in this case by the allegations of the bill. The bank having assigned all its property, including its banking-house, and the principal officers having absconded, its functions as a bank can no longer be exercised, and under the statutory provision a receiver can be appointed to wind up its affairs. And such action supersedes the assignment. The power of the court, under the circumstances, exists by virtue of the statute, and probably would exist even in the absence of any statutory provision. If the power exists, the propriety of its exercise cannot be questioned. It was fully

which provides that "courts of equity shall have power, on good cause shown, to dissolve or close up the business of any corporation, to appoint a receiver therefor, who shall have authority, by the name of the receiver of such corporation, to sue in all courts and do all things necessary to closing up its affairs, as commanded by the decree of such court." Revised Statutes of Illinois, 1874, ch. 32, § 25, p. 290.

But, independent of the enlarged jurisdiction thus conferred upon courts of equity over insolvent corporations, sufficient warrant for the interposition of a receiver may, it is believed, be found in the general equity powers of the court. A savings bank occupies peculiarly and emphatically a relation of trust toward its depositors. The obligation assumed, by virtue of the contract of deposit, is to receive and reinvest the deposits in safe and prudent securities. The sixty-day rule, which formed one of the by-laws of the State Savings Institution, as it does of most savings banks, places the deposits at the absolute control and disposition of the bank for at least that period of time. Indeed, as regards the nature of the investments made by the bank of its customers' deposits, and the securities taken, the bank is always invested with, and exercises, absolute control. The depositor is powerless in these respects, and his safety and security are dependent entirely upon the good faith of the bank. That such a relation is that of a mere debtor and creditor, or that of a depositor in an ordinary commercial bank, can hardly be contended. It is difficult to conceive a more clearly defined instance of the relation of trustee and *cestui*

and frankly admitted by the counsel for the assignee. It is only a court of equity that can give to the creditors of this bank adequate relief. The depositors want relief, not only against the bank—by a provident, wise, and expeditious administration of its assets for their benefit—but they want to reap all the benefit which they can derive from the liability imposed by law upon the stockholders. The assignee could do nothing for the depositors as against the stockholders, and it is only in a court of equity that such relief can be adequately administered. A receiver can not only do all that the assignee could do for the benefit of the depositors, but can probably collect for them many thousands of dollars which the assignee would have no possible means of reaching. I am fully satisfied that the court has the power, and that it is its duty, to appoint a receiver.

que trust growing out of the ordinary every-day concerns of life. And the element of trust being once shown to exist, no stronger ground can be afforded for the interposition of equity than the absolute and complete abandonment of the trust, under the attendant circumstances of fraud charged in the bill.

It was conceded that the complainants, invoking the extraordinary aid of a court of equity in the case under consideration, had no especial lien or claim upon the funds or property of the defendant bank other than all other creditors of the class to which they pertained. It is true, also, that courts of equity rarely interfere with any disposition, however fraudulent, made by a debtor of his property, unless the person complaining has a special claim or lien upon the property or fund, as by judgment, and has exhausted his remedy at law. But in *Eames v. The State Savings Institution* the element of trust, already demonstrated to exist, fully supplies, as a jurisdictional element in the case, the place of the judgment or other lien usually required as a condition precedent to equitable relief against fraudulent assignments. And the element of trust existing, upon which the jurisdiction of equity can attach—the alleged insolvency of the bank, the secret and fraudulent assignment, the previous wasting of the assets by the officers and trustees, and the utter and complete abandonment of trust by those whose duty it was to faithfully administer it—all these present sufficiently imperative grounds for the immediate exercise of the preventive jurisdiction of the court.

It is true that the case is largely one of first impression, and that the reports may be scanned in vain for frequent precedents; but it is to be remembered that the Spencerian system of banking is of comparatively modern origin. In the earlier days of the English chancery, and of our own courts of equity in this country, such breaches of trust as alleged in this case were of rare occurrence. Failures of savings banks and of trust companies are of comparatively modern origin, and form part of the phenomena of our later civilization. It is not, therefore, matter of wonder that exact precedents

for the exercise of the extraordinary jurisdiction of equity, in cases such as that under discussion, are of rare occurrence in the books. Let us rather accept their infrequency in our legal literature as proof of the purer, if ruder, civilization of our ancestors, and congratulate ourselves, as a profession, that the history of courts of equity, thus far at least, whatever may be the future, is not altogether a record of duties abandoned and trusts betrayed.

And yet we are not altogether without precedent for the relief granted in this case. The case of *Evans v. Coventry*, 5 De G. M. & G. 911, decided in 1854, is an instructive case in point. That was a bill for an injunction and receiver against the defendants, the trustees, treasurer, and manager of The General Benefit Health and Life Assurance Society, and The City of London Loan Society and Deposit Bank, both societies being operated jointly under one and the same management, by the same trustees and officers. Complainants were persons some of whom had effected an insurance in the insurance branch of the double corporation, while others had deposited funds with the loan or savings branch, which were due them with interest. The bill alleged mismanagement on the part of defendants; that the secretary had left the office in embarrassment; that the office was closed and the business discontinued; and that defendants had refused to repay complainants their deposits or insurance moneys. The answer admitted that the secretary had absconded, having appropriated to his own use considerable sums of money belonging to both societies. The case came before the lords justices of the court of appeal in chancery, upon appeal from the decision of Vice-Chancellor Kindersley, who had refused the relief sought. The lords justices reversed his decision, and granted an injunction and a receiver. The clear and emphatic manner in which the jurisdiction of equity, upon the facts stated, is asserted by the court is worthy of extended quotation. Lord Justice Knight Bruce observes (p. 916): "The application before the court is founded on the common right of persons who are interested in property which is in danger to apply for its protection.

The defendants are persons, or include persons, who owed duties to those represented by the plaintiffs in respect of the funds of the society, for the purpose of care and protection. Those duties appear to have been abandoned in a manner deserving, as it would at present appear, the strongest observation. It is a case of waste, partly perpetrated and obviously imminent. But for the judgment which has been given, and for which I feel the most unaffected respect, I should have said, from my experience of the practice of the court in Lord Eldon's time, that this was a plain case for that injunction and receiver, which I think ought now to be granted."

And Lord Justice Turner adds (p. 918): "According to the allegation of the bill, verified by affidavit or admitted by the answer, the plaintiffs are in the position of parties who have a charge on the funds of what I may, for the present purpose, call the original association. The defendants are in the position of trustees of the association. It appears that funds of that association have been lost by the act of the treasurer, whose conduct it was the duty of the other defendant to superintend. *Prima facie*, therefore, there appears a clear case for the interference of the court; for I certainly cannot accede to Mr. Selwyn's argument, that a breach of trust is not a sufficient ground for the interference of the court by the appointment of a receiver. Whether the plaintiffs will ultimately establish the commission of a trust is not the question now before the court. It is admitted that funds have been lost, of which it was the duty of the defendants to take care. That loss is *prima facie* evidence of a breach of duty of the defendants sufficient to authorize the interference of the court by the appointment of a receiver."

The analogy between the cases of *Evans v. Coventry* and *Eames v. The State Savings Institution* is too obvious to require comment. And these cases afford a striking illustration of the steady growth of the extraordinary jurisdiction of equity, and its constant and unfailing adaption to the necessities of the hour. Side by side with the rapid and wonderful development of corporate enterprises in Great

Britain and America, during the past generation, may be discerned, even by the casual student of our jurisprudence, a corresponding growth and adaption of equitable remedies to the needs of the hour. This constant shaping, by courts of equity, of remedies to grievances, of means to ends, gives striking emphasis to the observation of Lord Cottenham, in *Wallworth v. Holt*, 4 Myl. & Cr. 635, who says: "I think it the duty of this court to adapt its practice and course of proceeding to the existing state of society, and not, by too strict an adherence to forms and rules established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy." And if our American jurisprudence shall ever have a historian worthy of the name and the theme, not the least instructive chapter of his history will be that which pictures the adaption of the remedies of equity to the changing necessities and growing enormities resulting from the marvelous development and overshadowing influence of corporate enterprises. To formulate the problem here suggested, and to give it logical and accurate expression, is a task which we may cheerfully confide to the evolutionists.

Meanwhile, for us of the profession there remains a more practical and a more useful problem. Courts of equity may, as in the case of the State Savings Institution, by a wise shaping of their recognized jurisdiction, do much to remedy abuses and abandonment of corporate trusts; but they cannot prevent the recurrence of such abuses. And prevention, not cure, is the need of the hour. The problem must be committed to the legislation of the future, but that legislation must, in the nature of things, be largely molded and shaped by the bar. We are accustomed to descant vigorously against the evils of a paternal government, but we shall never stem the tide of corruption incident to the abuse and mismanagement of corporate trusts without more paternalism.

The remedy sought must be twofold. It must look, first, to the enactment of more stringent criminal statutes for the punishment of abuses of corporate trust, making the measure of punishment equally severe upon those who permit, as upon

those who commit, the actual fraud. In the case of the State Savings Institution it was the specious plea of the trustees and directors that they were totally ignorant of the embezzlements of the absconding president and cashier; that, with child-like credulity, they had trusted all to the management of these men, and had, like the depositors, been themselves duped and deceived. Make such ignorance on the part of these officials a crime, punish it with prompt, vigorous, and severe penalties, and we shall have reached, in part at least, a solution of the problem.

In addition to the criminal legislation here suggested, the other, and perhaps more effective, element in the remedy sought will be found in a thorough and rigid system of state inspection. Especially, it is believed, will this be found to be true in the case of savings banks, insurance companies, and other corporations occupying similar relations of trust toward their creditors. Let the state provide, at the expense of such corporations, a body of experts, whose duty it shall be to frequently examine, with the closest scrutiny, the actual condition of the corporation, with especial reference to its investments and securities. Such examinations should be made as thorough and exhaustive as trained experts can make them, and the results should be furnished periodically to depositors and creditors, and should be given the widest publicity by the press. With such precautions, shaped into practical legislation, it may safely be predicted that we should have fewer savings banks and insurance companies; but with equal certainty it may be asserted that, under so wise a system of paternalism, the Spencerian method of banking would soon become a thing of the past.

J. L. HIGH.

CHICAGO.

IV. RELEVANCY OF EVIDENCE: A REPLY TO DR. WHARTON.

I have read with interest some criticisms made by Dr. Wharton, in the *SOUTHERN LAW REVIEW* for April-May, 1877, on my "Digest of the Law of Evidence."

The editor of the *REVIEW* having done me the honor of suggesting that I might like to reply to them, I have great pleasure in doing so, both because I have but a very few words to say, and because I feel honored by the attention which my book seems to have attracted in America.

Dr. Wharton's first criticism on my book is that I have said that, according to English law, all facts in issue, and all facts relevant to the issue, may be proved, and no others; that I have explained that I understand by the word "relevant" a connection between the facts depending upon cause and effect; and that I have further explained that I understand by the word "cause" as Mr. John S. Mill understood it.

Upon this he observes that the truth of Mr. Mill's theory as to cause and effect is doubtful, and that, if it were true, it would follow that all evidence would be relevant to every issue, and that no issue could be narrowed to any particular line of evidence. My answer is as follows:

First. The truth of Mr. Mill's theory of causation is not assumed by my Digest, though I believe it to be true. In the last edition of that work I have excluded the article to which Dr. Wharton refers from the text, and have inserted it in a note, and I have defined the word "relevant" as follows: "The word 'relevant' means that any two facts to which it is applied are so related to each other that, according to the common course of events, one, either taken by itself or in connection with other facts, proves or renders probable the past, present, or future existence of the other."

The matter quoted by Dr. Wharton will be found in the third edition of my book as Note I in the Appendix of notes. It embodies a theory collateral to the law of England, and it not in itself law. In making it an article of my Digest, instead of a note to it, I think I was mistaken, but I do not give up the theory.

Second. Dr. Wharton's objection to the theory, as a theory, appears to me to be open to this reply: I admit that all things are, or may be, bound together in one vast chain of cause and effect, in Mr. Mill's sense of the words, and I also admit that it follows, from my theory, that all things thus are, or may be, relevant to each other. I deny that this constitutes any objection to my doctrine that the admissibility of proof of a fact depends on its relevancy to the issue. Before (upon my theory) proof can be admitted of a fact, as being relevant to the issue, the particular way in which it was, or might be, connected with some fact in issue must be suggested, and this cannot be done in cases in which the connection is obscure and indirect, and will not be done in cases in which the connection, though real, is too remote or too well known to be worth proving.

Possibly the American civil war of 1861-5 may have been one of the causes of the Russian and Turkish war of 1877, but, until it is shown how the two events are connected, the one would not, by my theory, be regarded as relevant to the other.

The facts which establish the law of gravitation are, undoubtedly, relevant to the question whether a railway accident was caused by negligence; but, as neither party denies either the facts or their relevancy, neither would think of offering to prove them.

Third. Whatever the value of this objection to my views may be, it applies with equal force to Dr. Wharton's. He proposes to substitute for my rule—that all facts in issue, or relevant to the issue, and no others, may be proved—the rule “that all conditions of a pertinent hypothesis are relevant to the issue, and that such conditions may be either proved or disproved.” Passing over, for the moment, the word “pertinent,” I observe that the “conditions of a pertinent hypothe-

sis" appear to me to be another name for what Mr. Mill means by the causes of the fact supposed to exist. Whatever, therefore, might be proved as "causes" on my theory might be proved as "conditions" by his. If it is true that we ought not to regard relevancy as dependent upon cause and effect because that would make all facts relevant to all other facts, it must be equally true that we cannot say that all the conditions of a pertinent hypothesis may be proved or disproved; for certainly everything may be regarded as one of the conditions of the existence of everything else.

The truth is that the question between Dr. Wharton and myself is only one of words. His rule is, "all the conditions of a pertinent hypothesis" (which he explains to mean "an hypothesis which, if proved, would logically influence the issue") "are relevant to the issue, and may be proved and disproved."

My rule is that all facts in issue, and all facts relevant to the issue, may be proved.

The word "relevant," in Dr. Wharton's rule, seems to me to be superfluous. If you say "all the conditions of an hypothesis which, if proved, would logically influence the issue, may be proved or disproved," I do not see what is added by saying also that they are "relevant;" and, if Dr. Wharton's rule is thus stated, the only difference between us is that I describe as "a fact relevant to a fact in issue" that which he describes as "a condition of an hypothesis which, if proved, would logically affect the issue." I like my own phrase best, because I think that to English people at all events it is the clearer and simpler of the two; but they both seem to me to mean the same thing.

Dr. Wharton's remarks lead me to think there may be some difference between the way in which the word "issue" is used by English and American lawyers. Dr. Wharton says "the distinction made" by me "between 'facts in issue' and 'facts relevant to facts in issue' cannot be sustained. An issue is never raised as to an evidential fact. The only issues the law knows" (this must mean the law of the United States, or of some one or more of the particular states) "are

those which affirm or deny conclusions from one or more evidential facts." However this may be in America, we in England attach a perfectly distinct meaning to the phrase, "facts in issue." I have given a definition of it in my book, and I do not think its correctness has been, or can be, disputed in this country. It is this: "The expression, 'facts in issue,' means

"(1), all facts which, by the form of the pleadings, in any action, are affirmed on the one side and denied on the other;

"(2), in actions in which there are no pleadings, or in which the form of the pleadings is such that distinct issues are not joined between the parties, all facts from the establishment of which the existence, non-existence, nature, or extent of any right, liability, or disability, asserted or denied in any such case, would by law follow."

To me this definition seems intelligible, and the distinction which follows from it plain. Take a very simple case: A claims property as heir at law to B, against Z, who is in possession of it. Here the right to be determined by the action is A's right to the property. This right will be affirmed by the court if it appears that A is heir at law to B. But if A is B's eldest son, he is B's heir at law. Here the fact in issue is A's being B's eldest son. A affirms that fact, and his adversary, Z, denies it. The fact is said by English lawyers to be "in issue"—that is, an affirmation of it by A and a denial of it by Z is the "issue" (*exitus*) or final result of their written debate. The jury are to decide which is right, and the court draw the inference of law from their decision. This seems to me to draw a plain distinction between the fact that A is B's eldest son and the facts which merely tend to prove it. Suppose, for instance, that it were shown that B always said that A was his eldest son, and treated him as such, and that Z had himself admitted it; these facts would not be "in issue," but they would be relevant to the issue. Dr. Wharton says that if A were tried for murdering B, the fact that A had killed B would not be in issue, or, as he calls it, "issued," because, if "counsel should ask a witness whether A killed B, the question

would, if excepted to, be ruled out on the ground that it called, not for facts, but for a conclusion from facts, and to such conclusions witnesses are not permitted to testify." No doubt "A killed B" embodies an inference which, in particular cases, might be remote and doubtful—as, for instance, if A gave B a wound, and B died some months afterwards—and in such cases the question, Did A kill B? would be improper; but all language embodies inferences of some sort. Thus, "A knocked B down" embodies an inference, to wit, that A's blow was the cause of B's fall; but who would deny that the question whether A knocked B down was a question of fact? Such expressions are simply abbreviations. The expression, "A killed B," seems to me to be an assertion of a fact, or set of facts, as thus: A pushed a knife through B's throat; B's blood ran out; B's heart left off beating; he ceased to breathe or move, etc., and nothing else except the cutting of the throat happened to account for these symptoms.

According to English law, the facts that A did to B something or other which usually kills people, the facts that B died, and that nothing which usually kills people except A's act preceded B's death, would be described as facts, or collectively as a fact, in issue upon A's trial for the murder of B, and those facts would be said to be put in issue by A's plea of not guilty. So true is this that, till within living memory, an English indictment for murder set out in detail the means by which death was caused, and the plea of not guilty was taken to be a specific denial of each and every one of them. Even now, if a jury in England chooses to find what we call a special verdict, their duty is to find specially all the facts in issue, as distinguished from the facts relevant to the issue, and from the facts so found the court has to draw the legal inference.

Dr. Wharton appears to dislike the word "fact," which he says is ambiguous. There is little use in discussing questions of phraseology, which are very much matters of taste and fashion; but I think a jury in this country would be puzzled if they were told that A's killing B was not a matter of

fact, but that it was an hypothesis pertinent to the charge of murder brought against A, all the conditions of which hypothesis they were to consider with a view to their verdict.

Upon the whole, with the greatest respect for Dr. Wharton, whose name is well known and greatly respected amongst English lawyers, I cannot see that the difference between us extends to anything beyond this : that each of us expresses the same meaning in words which differ, principally, because we hold different views as to the nature of the relation between cause and effect—a question which is surely collateral to law, and ought to be kept distinct from it ; a truth which I no doubt forgot when I mixed up the two things in the first edition of my book.

J. F. STEPHEN.

TEMPLE, LONDON, Sept. 14, 1877.

V. INTER-STATE REVISION AND CODIFICATION.

Legal reform is a thing of tardy growth. Like the alluvions from the rivers, or the birth of the islands of the seas, it is only after long years, or perhaps generations, that it attracts the attention or is estimated.

Gradually, but tardily, from the government of force we are dawning into the government of reason—from a rule of empty form, superstition, whim, and caprice into a rule of just right, plain law, and broad equity. If we will look a little into the past, we shall find the law embedded in an almost impenetrable form and technicality—then considered an inseparable and necessary part of it. The simplest transaction between men, and inconsiderable cause of action in the courts, had its stately and imposing recital or presentation.

Gradually these forms and ceremonies—and now, and to us, largely apparent absurdities—have been mostly abolished, and instead we have a plain declaration of the legal right, and a plain and simple mode of attaining it. But still there remains too much of the past, and we cling to ancient usage and time-honored custom as to sacred things, and are only fairly beginning to discuss the propriety of exalting justice above form, and equity above law. In many of the states grand strides have been made, and the shackles and barriers which have intervened between the just right and the attainment of it have been given to the winds. As a rule, the younger states have gone furthest in the reform, and California, perhaps, stands at the head. New York and some other of the older states are not far behind, and in almost all of the states codification is coming to be adopted.

But there are those who still oppose codification. To them, it seems to us, it means either too much or too little;

and their objections appear to arise from a misapprehension of its aim and use. To them it means either innovation—the over-turning of all law, and consequent confusion—or emasculation, and the creation of new laws within narrowed limits of expression, comprehension, and investigation.

The work of the codifier should be, in a sense, largely that of the digester; but not entirely so. In order to create harmony, simplicity, and a sufficient comprehensiveness, he must create somewhat anew, modify, and change. Yet these creations, modifications, and changes would hardly be more than an expression of a new rule drawn from the old sources, or the old rule adapted to the new order of things.

The great body of our law is the outgrowth of, and founded upon, a few broad underlying principles. The reduction of these to writing and systematic form, with reference to their application to the varied wants, necessities, and transactions of men, comprises the labor to be performed by the codifier.

When we reflect that it becomes the daily duty of the judge to perform this labor, we shall see that it is only a question whether it is better to defer it to him, or to impose it upon a learned commission, who shall be selected with especial regard to their peculiar fitness for its performance, and who should present the result of their labor in an available and harmonious body. The latter course would seem to commend itself, certainly, inasmuch as they might apply the principles of law to any particular state of facts or condition of things as being legislation before the fact rather than after it, or, in other words, prospective rather than retrospective legislation.

The labor of the judge, too, is fragmentary and contradictory, and not available. It is spread over such a wide space that it is impossible, except in rare cases, that he can be consulted. His determinations, too, are often the result of most hasty and partial examinations of the law, and are often biased by some peculiar phase of the case, which should prevent it from becoming a precedent. Of course we appreciate that the offices of the judge and the attorney will

never cease. Perhaps no set of men will ever be able to frame a code of laws that will, *per se*, govern any considerable body of men, or even be of easy application to all the varied wants, transactions, and phases of human society. But this does not argue against the accomplishment of the object so far as may be. That it may be done to a very great extent is evidenced in many ways. This fact has its illustration in the Mosaic Code, the Twelve Tables, the *Consolato Del Mare*, the Institutes of Menu, the Justinian Code, French, Austrian, and Burgundian Codes, and codes of other nations; of several of the states of the Union; in *Magna Charta*, Statute of Frauds, the Constitution of the United States, and of the several states; and, in a more general sense, in the Ten Commandments, the creeds of the churches, and secret organizations.

Indeed, codification is a necessity, and from the earliest dawns of law has been so considered. We have not space to name, even, the numerous instances where it has been adopted in the past. Almost every branch and subject of our law has again and again been subject to its treatment. Indeed, it may be now considered as the enlightened verdict of mankind that this is the high road to legal reform. The jurists of the present century are becoming awakened to its necessity. The rapid accumulation of statutes, reports, and treatises have shown them the requirement for a systematic compilation and codification of the laws. The vast number of cases and principles thus promulgated from year to year in a scattered, disconnected, unorganized form, and drawing their inspiration from such varied sources, renders the study of the law a task almost beyond human attainment.

But it was rather the purpose of the writing of this paper to call the attention of the reader, not so much to the general necessity of codification, as to the necessity which now exists for an inter-state revision and codification of the laws of this country. We appreciate, however, that whatever argument applies to the general subject applies to this particular object. Perhaps there never existed so large a nation over whose territories a unit of law might so properly prevail.

With a common civilization, usage, custom, and habit, there appears to be no great barrier to the accomplishment of a code applicable, in almost all respects, to the entire body of the states of the Union. The establishment of such a code, it seems to us, would be of almost incalculable benefit to our people. It would promote the cementing of the bond of union between the states, the general understanding of the laws by the masses, render more certain and secure the rights of property, and the elevation of the law itself. In England, where those general and fundamental anomalies exist which render the laws of that country so complex, the work of codification has been much more agitated, and the labor much further progressed, than in this, where these obstacles do not exist. The same is true of France, and of almost every government of the continent. Perhaps a very great part of the apathy in this country on the subject is owing to the independent character of our state governments, which, while it indicates the cause, contains no argument against the object proposed. Another reason why the labor has not been undertaken is the want of appreciation or knowledge which generally exists as to the diversity of statutes in the different states upon the same subject, and the interpretation given by their courts to the common law. We, as attorneys, are in the habit of quoting the decisions of other states than our own as authority for the consideration of the court in individual cases. But, notwithstanding this practice, the commentator on any branch of our law will find the decisions of the courts of the several states following, more or less, distinct lines of demarkation. And this often for no greater reason than because the first judge who had occasion to determine the question in the state so decided, and his decision became a precedent. Many of these early decisions it has become the duty of the modern judge, with the fuller light thrown upon the subject, to overrule. Still, the overturning of these long-established rules, even when it is very apparent that they are not in harmony with the sound principles of the law, is a labor that the judge reluctantly enters upon—as well he ought, for such an attempt would often

result in the worst effects of retroactive legislation. It is usually only his province to determine upon the past, not to make laws for the future.

While we have advanced somewhat beyond the condition of things when Agobardus said "it often happens that five men, each under a different law, may be found walking or sitting together," or when, as was the case in the middle ages, a man might elect the law by which he wished to be governed, yet something of the same condition of things is true in this country to-day. If we were to examine, we should find that the law governing the individuals of any assemblage of men, brought together from the different parts of our country, widely varied, either in its letter or application.

We have not time or space to particularize these differences—nor is it necessary to do so for lawyers. If we name a few subjects, they will recognize the truth here stated, and be able to carry the distinctions throughout almost the entire list of subjects within the purview of statutory and common-law regulation. Take, for instance, the subject of crimes and misdemeanors, of marriage and divorce, of damages, mortgages, mechanic's and vendor's liens, slander and libel, limitations, landlord and tenant, attachment, etc. A modern writer on the subject says that "it should not be surprising that there is a great want of uniformity of rules of damages in different states and countries, or that there is a wide difference in the verdict of juries on the same state of facts. The diversity in the rules is largely owing to the fact that these rules, from the necessity of the case, are artificial and arbitrary. They are adopted frequently as approximations of justice, and as being desirable for uniformity in the *particular locality, and not from the sense of their being based on absolute justice or universal principles.*" That this subject of the law should undergo a thorough and wise codification is evidenced by the absurd, and sometimes monstrous, verdicts arrived at, arising from its unsettled condition and the contradictory interpretations of it. The ancient case of the lover whose horse cast a shoe while he was riding to

embrace his love and marry his wife, by reason of which accident he was belated, and his affianced married another, and who sued the blacksmith who put the shoe on, and recovered damages for the loss of a wife, we suppose, is hardly more ludicrous than many cases that have come within the knowledge of every old attorney.

The insecurity of the rights of property, arising from a want of uniformity of rule, with reference to conveyances, mortgages, and liens, of descents, and of marriage and divorce, has occurred, perhaps, to most persons. There seems to be no good reason why one rule should not prevail in all the states in every one of these instances. The same is true of almost every branch of the law—of course we recognize that, in certain cases, owing to some particular conformation of the country or condition of its inhabitants, special legislation would be required. This is true now with reference to the codes of the different states. A state, with reference to the laws that govern her, is an epitome of the general government, and it is just as practical to adapt a code to the one as the other. Nor would the labor be greatly more, or more difficult. When we reflect that any state code must define the law upon nearly the entire breadth of subject that would a national code, we shall see that it would only be doing for all what is now done for one. For instance, the codes of New York or of Massachusetts might, perhaps, with slight modifications or additions, be adopted for all the states.

If the labor should still seem to any to be great beyond accomplishment, it ought to be sufficient to remind them that like and greater labors have been accomplished for others. That Tribonian and his nine associates perfected the *Constitutiones* in one year, and with his sixteen associates the Digests in three years, and that these comprised the laws and learning of ten centuries, or, as the emperor expressed it, "all the law of antiquity." The other codes already named, and many others, illustrate the easy accomplishment of the labor proposed. We might refer in this connection, also, to another class, whose labors have com-

passed, in some cases, the entire body of the law, and, in others, particular subjects, and whose labors, in a sense, are codifications, and without which the law would be, to-day, a much more shapeless mass than it is. We refer to those great commentators on the law, Coke, Littleton, Blackstone, Kent, Story, Parsons, Redfield, Sharswood, and others, to whom, perhaps, as much as to any other influence, the law is indebted for its present perfection. When we think of the possible, and, we may say, probable, accomplishments of a learned body of men with equal capabilities with these, united in a common purpose, and animated with the laudable ambition and inspiration which is the accompaniment of a great undertaking in a right cause, we feel that we are living centuries behind the possibilities of our age, and are lacking in the incentives to great enterprise, or in great minds and ambitious genius, or that we are too much given to the less glorious, but perhaps more remunerative, pursuits of our profession.

The great labor which remains to the American jurist is to create a national code which shall have application throughout the country. The benefits to be derived therefrom—from engrafting into the laws of each state what is most valuable in all, and thereby enabling the denizen of one state to know what his rights or legal liabilities are in another, or to construe the law of all the states by construing that of his own—are so evident as to need no enumeration or argument.

But, not only is the object proposed sanctioned by every reason which might be urged in behalf of progress and an enlightened jurisprudence, it is becoming a necessity. As we have intimated, the now almost unattainable and rapidly increasing mass of our law statutes, reports, digests, commentaries, etc., it will soon be beyond the labor of a life-time to consult. The demand for, and rapid increase of, digests in every state and in every department of the law argues plainly the necessity that is upon us of condensing, unifying, codifying our laws. Already attorneys and judges are driven to the necessity of consulting these digests as final expositions of the law—a practice most bane-

ful in its results, conducing as it does, to mistaken, partial, and superficial views of the law.

The day will come when the labor of codification must be accomplished. The day is already come when it ought to be. The goblin that deters from this labor is principally the idea of innovation and change. As we have seen, this idea is largely without foundation, although not entirely so; for it must be conceded that an assimilation of the statutes of the several states, and the giving of a uniform expression to the common law, would require some investigation and new labor on the part of the attorney and the judge; but even for the present generation their labor in arriving at what the law is, upon any given question, could hardly be greater than it is at present. It never will happen, certainly, if the common law is all that its admirers and those who oppose codification claim for it, that any learned body of men would find it necessary to overturn or supplant it. Nor are we able to see that, by codifying it, the meaning must necessarily be changed or shorn of its strength. But no great reform is accomplished, or progress made, without more or less change and inconvenience. The *habitué* of the old and dingy resorts for public entertainments, where formerly hospitality was administered in a primitive, and perhaps rude, way, would feel inconvenienced in one of our modern palaces, where nearly all the wants of men are anticipated. Should these modern institutions therefore be discarded? The introduction of new, improved, and complicated machinery into manufactories often necessitates long study and experience in order to its use. Would it be wise, therefore, to reject it? Whatever inconvenience might result to some by a codification of our laws, the benefits would more than compensate for it. All this inconvenience would disappear with another generation, and the blessings to posterity be almost beyond estimation.

Mainly, the question involved in all this discussion as to the propriety of codification is as to where the law-making power should be vested—in the courts or in the legislature. Our constitution says in the latter, and the spirit of our gov-

ernment and its institutions demands that it should be placed there.

Mr. Sharswood, in his essay on "Legal Education," says of judicial laws that "they are always retrospective; but worse on many accounts than retrospective statutes. Against the latter we have at least the security of the constitutional provision which prohibits the passage of laws which impair the obligation of contracts, executory or executed; and it has been well held that the prohibition applies to such an alteration of the law of evidence, in force at the time the contract was made, as would practically destroy the contract itself by destroying the manner of enforcing it. There is no such constitutional provision against judicial legislation. It sweeps away a man's rights, vested, as he had reason to think, on the firmest foundation, without affording a shadow of redress. * * * Judicial legislation is much worse than legislative retrospection. The act of the assembly is carefully worded—is, at least, a certain rule. The act of the judicial legislation is universally the precursor of uncertainty and confusion."

Without codification, our laws are largely made up of judicial legislation. The wise and satirical Bentham says: "The common law of England—as it styles itself in England, *judiciary law* as it might more properly be styled everywhere—which has no known person for its author, no known assemblage of words for its substance, forms everywhere the main body of the legal fabric—like the fancied æther which, in default of sensible matter, fills up the measure of the universe. Shreds and scraps of real law, stuck upon that imaginary ground, compose the furniture of every national code. What follows? That he who, for the purpose just mentioned, or for any other, wants an example of a complete body of law to refer to, must begin by making one." Pref. to Prin. of *Morals and Legislation*, p. 8.

Perhaps we need not have occupied so much, or any, space in the article to show the propriety of, and benefits to be derived from, codification. But if codification is a good thing, and good for other countries, it is good for this. If

it has been found to be beneficial and conducive of the enlightenment and convenience of the states to enact codes, and thereby reduce their laws to unity, harmony, clear and exact expression of the legal rights of the citizen, for the same reasons the laws of the several states should be assimilated and have a common and definite expression.

We have used the word code in its most general sense. Naturally, such an instrument would be the subject of amendment and revision. Perhaps no state legislature would meet between this and the millenium but what would consider it incumbent on itself to amend it. But this should be brought under proper regulation. Of course, too, we appreciate that no at present constituted authority could enact such a code, or that any commission could or should do more than prepare one for the adoption of the states severally.

As to how the commission should be composed, or how proceed with their labors, or how amendments might be made, etc., we have not time or space to enter upon here. Perhaps, in any event, such a labor should be performed without federal authority or supervision.

P. N. BOWMAN.

WASHINGTON, D. C.

VI. THE TAXATION OF MONEY.

"In 1869, or previous, Charles W. Kirtland, a citizen of Woodbury, Litchfield county, Connecticut, loaned money through an agent, a resident and citizen of Illinois, on bonds secured by deeds of trust on real estate in the city of Chicago. Each of these bonds declared 'that it was made under, and is in all respects to be construed by, the laws of the state of Illinois;' and that the principal and interest of the obligation were payable in the city of Chicago. The deeds of trust also contained a provision that all taxes and assessments on the property conveyed should be paid by the obligor (borrower) without abatement on account of the mortgage lien; that the property might be sold at auction, in Chicago, by the trustee, in case of any default of payment, and that a good title, free from any right of redemption on the part of the obligor, might, in that case, be given by the trustee. Another interesting feature of the case not to be overlooked was that, pending the proceedings next to be related, the loans, as originally made, became due and were paid; when the proceeds, without being removed from Illinois and returned to Mr. Kirtland, in Connecticut, were reinvested in Chicago, by his agent, under terms and conditions as before.

"These facts becoming known to the tax officials of the town of Woodbury, they added, in 1869, to the list of property returned by Kirtland for the purpose of taxation, as situated within the state,* the sum of eighteen thousand dollars, and, in 1870, the sum of twenty thousand dollars, to represent the amount of property owned and loaned by Kirtland in each of these years, as was conceded, without the territory of the state. The sums thus added were subsequently assessed in the town of Woodbury in the same manner and at the same rate as was other property which Mr. Kirtland owned within the state, and there situated.

"Payment of the taxes thus assessed on the amount of these Illinois loans being refused by Kirtland, the tax collector (Hotchkiss), in April, 1873, levied his tax warrants on the real estate of the alleged delinquent, in Woodbury, and advertised the same for sale; and, on petition for injunction to restrain the collector from such proceedings on the ground of the illegality of the tax in question and its assessment, the case came for the first time before one of the inferior courts (the Superior) of Connecticut. There, upon hearing, it being agreed by all parties concerned that the only question in the case was whether the bonds owned by Kirtland, drawn in the form and secured in the

* *Query.* How could the authorities have consistently returned the loaned money "as situated within the state," and at the same time "conceded" that it was "without the territory of the state," as stated a few lines below? Here is an inconsistency which must arouse the suspicion that the case is being stated as favorably as possible to Kirtland.

manner stated, were liable to taxation in Connecticut, the cause, by agreement, was referred (for advice) to the court of last appeal in the state, known as the Supreme Court of Errors, a temporary injunction, in accordance with the prayer of the petitioner, being at the same time granted. After further hearing and argument, the latter court, in June, 1875, dismissed the petition and dissolved the injunction, one judge (Foster), out of a full bench of five, alone dissenting. Sent back to the Superior Court, the record of the case was then, on motion, transmitted again to the Court of Errors, for revision of errors in respect to involved questions of constitutional law; and, the decision being here again adverse (the judges dividing as before), the case was next appealed to the Supreme Court of the United States, on the docket of which it now stands entered for trial in order."

The foregoing is a statement of the facts in the case of *Kirtland v. Hotchkiss* (42 Conn., part II, 1876), found in an article, arguing the Kirtland side of the case, which recently appeared in the *Atlantic Monthly* over the signature of one of the most gifted lawyers of the country, who, although neither claiming nor disclaiming any professional connection with the case, is presumably the attorney of the unfortunate Kirtland, whose hardship in being thus obliged to defend the wealth he has accumulated from the horrors of taxation seems to have urged his distinguished counsel into the irregularity of a mode of advocacy which, to say the least, is of questionable expediency, and of unquestionably bad taste.

"After-trial advocacy," so deprecated by the universal sentiment of the American bar, seems innocent in comparison with the *ex parte*, *quasi-professional* discussion in the public prints of grave questions of law arising in actual causes soon to come before our court of last resort; and the ample opportunity afforded for full and free discussion of all such questions in the public presence of the court itself should forbid that the court should be insulted by the inference that it may be influenced in its decision by the public opinion which such extra-professional advocacy may be supposed capable of manufacturing.

The article in question is an important and valuable contribution to certain branches of the law, and an able and ingenious argument; but, being based upon false premises, so far as the case at bar was concerned, it is of doubtful

value in the elucidation of the real questions involved in the case which it was intended to affect. The writer takes great pains to hold up to view the alleged fact that the attempt of the Connecticut authorities was to tax the "title" which Kirtland held in the lands in Illinois, whereas he held no title at all; and to tax the "debt" due to Kirtland, and the "bonds and trust deeds" which were given to secure the debt, whereas the attempt was, in fact, to tax Mr. Kirtland's *money*, which they had a perfect right to do.

It is not contemplated, in this paper, to undertake any refutation of the arguments used in Mr. Kirtland's behalf, except incidentally, because, however sound they may be as applied to the question of the right of the Connecticut authorities to tax Mr. Kirtland's "title" or his "debt," which is assumed to be the question raised in the case, they are not addressed to the real point in the case, which is the right of those authorities to compel from Mr. Kirtland, by the obligation of his oath to his return of taxable property, or by such other means as the local laws provide, a full and complete schedule of such property, and, failing in this, to fix an assessment by estimate, and thereupon to assess and collect a legal tax.

The Kirtland case, in fact, raises a question not discussed by the article mentioned, and which the mere existence of such a case would seem to imply has not been heretofore settled, viz.: Is money taxable?

Could Mr. Kirtland, because his means consisted of money, instead of goods, or cattle, or real estate, avoid the burdens which the law imposes upon the property of every individual citizen for the maintenance of the state?

Could he have avoided taxation if his money had been in Connecticut instead of Illinois? And, if he could not, could he do so by simply removing it to another jurisdiction, where, not being personally present and amenable to the local laws, or subject to the obligation of swearing to a return of his taxable property, or of contributing, as a citizen, to the maintenance of the commonwealth, the collection of taxes might be rendered difficult or entirely defeated?

The questions alleged to have been involved in the case, in the article we have been considering, are thus stated :

"*First.* Was the debt due Kirtland, from a citizen of Illinois, property, or is any debt, abstract or particular, ever entitled, from a rational and politico-economic point of view to be thus considered and treated? We say from a rational and economic point of view, because a complete sovereignty may, if it please, enact that black is white, and compel all persons within its jurisdiction to act in conformity with the enactment.

"*Second.* Did jurisdiction over the person of Kirtland, by the state of Connecticut, warrant the assumption that the state had jurisdiction over his transactions in Illinois, and that a debt due him from a citizen of Illinois had its *situs* in Connecticut, and was so made subject to such laws as that state might enact in respect to taxation?"

And, in the discussion of these two questions, the writer adopts the following subdivision of his subject :

"What is property? What are titles to property? The relation of debts to property. What the Connecticut court decided. Can Connecticut tax the incidents of business transacted in Illinois? Can eastern states constitutionally tax the borrowing power of citizens of western states?"

The text of the first subdivision (which, by the way, is the only one of the six germane to the case) consists of the formula that "property is always a physical actuality, with inhering rights or titles, the product solely of labor, and is always measured, in respect to value and for exchange, by labor."

Was not, then, Mr. Kirtland's *money*, which he had loaned in Chicago, "a physical actuality," etc.? And as such being property, was it not a subject of taxation?

The question, "What are titles to property?" however interesting in the abstract, has nothing to do with Mr. Kirtland's case, because he had no *title* to the Illinois land pledged to him for security. He had a nude equitable right to require the sale of the lands by the trustee, based upon the remote contingency of a failure of payment of

the part of the borrower. Is that a title? If not, why waste words in denying that a "title" of that sort, *if* a title, can be taxed, especially as there had been no attempt to tax Mr. Kirtland's "title?"

As to "the relation of debts to property," there was no doubt that Mr. Kirtland's interests in Chicago might be, in one sense, a debt. But even here the argument of Mr. Kirtland's defender is based upon the formula that "a debt is the *evidence* of a *transfer* of *property*," etc. Precisely. The Connecticut authorities, however, were not claiming to tax the "evidence" of the "transfer of property," but the property itself—the money which Mr. Kirtland had transferred to the Chicago borrower.

The Connecticut court decided, according to the statement quoted at the beginning of this paper, that Mr. Kirtland had no case. Exactly *how* the court arrived at this decision does not there appear, nor is the language of the court given under the fourth head of the article. If it were important for the purposes of this paper we might refer to the published opinion, but, as we are not attempting an argument of the case before the Supreme Court, which has yet to review that opinion, we may content ourselves with the examination of the one broad principle involved, viz., the power of the state to tax money as property.

Nor does the question whether Connecticut can "tax the incidents of business transacted in Illinois" cut any figure in the case, simply because Mr. Kirtland was not transacting business in Illinois, any more than he would have been if he had loaned a friend a horse for a trip across the Rocky Mountains.

We feel tempted to examine a little more closely the question whether the eastern states can "constitutionally tax the borrowing power of citizens of the western states," because, as it seems, the citizens of the former have latterly become a race of lenders, and those of the latter, unfortunately, a community of borrowers; and the question, in the abstract, is a deeply interesting one, and may become, in the near future, one of most vital importance. As yet, however,

there is nothing more dangerous in sight than the fact that most of the capital of the country is in the East, where it is not needed, and where rates of interest are low, and is tending, in the shape of loans like that of Mr. Kirtland, towards the West, where it is needed, and where rates of interest are high. The true question of the future will be, however, not of unconstitutional legislation in the eastern states, but whether such loans as Mr. Kirtland's comprise the best mode of redistribution.

Under this head the advocate of Mr. Kirtland's anti-tax-paying position avers that "the reversal of the Connecticut decision by the United States Supreme Court will undoubtedly lower the rate of interest immediately in the western states to the extent of more than one per cent., and give a new life there to trade, business, and transactions now obstructed by a feudal and arbitrary edict;" while, on the other hand, it is argued that, if the Connecticut decision is affirmed, "the borrowers of Mr. Kirtland in Illinois will pay a higher rate of interest, or they will be unable to obtain the money, if Mr. Kirtland may be constitutionally subjected to a tax in Connecticut, the place of his residence, on his transactions in Illinois." In plain English, if the courts compel Mr. Kirtland to contribute his just share to the support of the commonwealth of which he is a citizen, as all other honest citizens not fortunate enough to be able to condense their estates into money which they can loan in other states are compelled to do, he will "grind the face" of his unfortunate Chicago borrower to make up the deficiency in his income. How the Chicago borrowers will relish this threat, and how the learned men who sit upon the Supreme Bench of the United States will look upon such arguments, it is not our province to conjecture.

To return to the questions which it is claimed are involved in Mr. Kirtland's case, it may be again said that, as to the first, there appears no proof that the authorities of Woodbury attempted to tax the debt due to Kirtland by the Chicago borrower. Whether a debt, abstractly, is property, or not, is immaterial to the real issue. The tax was levied

upon the property of **Kirtland**—the money—with whose possession he had parted, temporarily, for a consideration. We do not mean to affirm that, if **Mr. Kirtland** had taken no security for his loan, and it had become lost, as a “bad debt” is lost, he could then have been taxed indefinitely upon his money thus lost, any more than he could be taxed indefinitely upon a cow or a horse which he had once possessed, but which had been stolen or killed. So long as the reasonable certainty of recovering the property he had loaned remained, it continued to be property—his property—and subject to taxation.

The second question stated is of some importance, as incidentally involving the conflicting jurisdiction of the two states named. Should **Mr. Kirtland** be required to pay taxes on his property (money) loaned in Illinois in that state, or in Connecticut where he resides? This will be considered as we proceed.

The state, in the maintenance of its existence and public institutions, has the inherent right to require of each of its citizens, according to his possessions, his just proportion of the revenue required and prescribed for such purposes; and, therefore, a tax is provided which must operate uniformly upon all classes, and especially upon all individuals, exactly in proportion to that part of the aggregate wealth of the state which each individual possesses. Any other mode of producing revenue would, of course, be inequitable, and, as is declared by the constitutions, unlawful. **Mr. Kirtland**, or any other citizen, because he happens, or has been cunning enough, to own money, instead of lands or goods, does not, therefore, possess less of the aggregate wealth of the state than if his money was invested in lands or other more tangible species of property. Can he, therefore, be relieved from his share of the burden which the state is entitled to impose upon all her citizens in proportion to their individual possessions?

No one can deny that the state has a right to tax the citizen's *property*, or, more strictly speaking, to tax the *citizen upon* his property. Will it be denied that money is

property? It is not even attempted, in the argument of this case of Kirtland's, where its well-supported denial would have been so conclusive of the question actually involved. We may therefore conclude, without going further, that, if it *could* have been denied in this case it *would* have been. If, therefore, the state had the right to tax Mr. Kirtland's property, it had the right to tax his money; for money is property. Because Mr. Kirtland had, for a consideration, parted with the possession of his property temporarily, was it any the less property? If it had been a horse or a steamboat, would it have been any the less his property, subject to taxation *somewhere*, because the borrower lived, and used the borrowed property, in another state? The bonds and deeds of trust which the borrower gave as security, and which Mr. Kirtland—properly enough, perhaps—claims are not property, and hence not taxable, were given as hostages to secure to the lender the return of the thing borrowed—as if a man should deposit his watch with a stable-keeper to secure the return of a borrowed horse. It is true that the deeds and bonds and mortgages used as the evidence of security for borrowed money do not stipulate for the return of the specific coins or bank-bills which are loaned, because money is a property of such a character that any one coin, if of lawful weight and purity, is of equal value with another of the same class; any one bank-note or bill of exchange, if stamped with the qualities of genuineness and credit which give it value, is of equal value with another possessing the same general and requisite characteristics. Men sometimes swap horses “even,” or mayhap an ox for a cow “even,” but such instances do not clothe the subjects of the trade with this attribute of money, because that which gives force and life to the attribute—custom—is wanting.

The ancients were accustomed to use sheep, cattle, measures of grain, bits of iron and brass, and the Indians, beads and belts of “wampum,” as a circulating medium, just as we now use gold and silver, bank-notes, and bills of exchange. Would Mr. Kirtland's case have been different if our cur-

rency had consisted of calves? Suppose, in that case, Mr. Kirtland had loaned his Chicago friend 1,000 calves instead of \$18,000, would he not have been quite as liable to pay taxes on his calves as on his other "flocks and herds" for which he had no borrower? Would his calves be exempt from all taxation because he had loaned them? If not, why should his money be exempt? Would his calves be exempt from all taxation because the borrower, happening to reside in Illinois, took them there? Mr. Kirtland, according to the statement of his case, does not seek immunity from taxation in Connecticut because he is, or has been, or is likely to be, subjected to the payment of a tax on his money in Illinois. He seeks immunity from all taxation because, instead of possessing taxable property, as the Connecticut authorities supposed, he has "prestidigitated" his means into a sort of nondescript property which is not property at all, and, therefore, not taxable. He does not claim that the Illinois authorities have actually taxed his money, or even attempted to do so. How should they know that he has any property there? His deed of trust is on record, it is true, but where is he? How can they proceed to collect the tax, except by foreign attachment, and garnishment of his debtor, and does any state law provide such proceedings for such a purpose? And, indeed, would not Mr. Kirtland's first and chief defence to such a proceeding be that, being a citizen and resident of Connecticut, to which commonwealth he owed allegiance and support, the Connecticut authorities alone, if any, had the right to levy and collect taxes from him on everything he owned, not exempt by law, except real estate situated in other states? It cannot but appear that, if he owed taxes on his money to any one, he owed them to the state of Connecticut.

We have said that the deed of trust given to secure Kirtland was to secure the return of the money loaned. In theory, it was to secure the return of the specific articles loaned. If it was not so in fact, it was because the currency, the gold, or silver, or bills of exchange which were actually sent by Mr. Kirtland from Connecticut to Chicago, could

have been replaced by others of equal value, such as by custom were ordinarily substituted for sums so transferred. His property in them was not changed; his ownership, by express stipulation in his bonds and deeds of trust, did not change, but was to remain the same as if he still held the money within his own immediate corporal possession. It was his money, loaned, just as much as it was his while on deposit in bank, or otherwise within his immediate control. The borrower did not receive from him the ownership, but the use of it for a given period. He did not pay, or agree to pay, Mr. Kirtland for the money itself, but for its use. It was a bargain by which both parties were benefited. Now, if Mr. Kirtland did not part with the ownership of his money when he received the bonds and deeds of trust which represented and evidenced, not the money itself, but the *transaction*, how can it be claimed that there was nothing for the Woodbury authorities to tax but those papers, and that they, not being property, cannot be taxed?

Some stress is laid upon the fact that, when the payment of the first loan became due, Mr. Kirtland's agent in Chicago received, pending the legal proceedings described, from the borrower, the money Mr. Kirtland had loaned him. This being so, what became of Mr. Kirtland's alleged "title" to the Chicago land, which it is claimed the Woodbury authorities were trying to catch and tax, and which it required so labored an argument to prove could not be taxed? And Mr. Kirtland's agent, instead of perpetrating the awkward blunder of transmitting the returned loan to Woodbury, where, perhaps, those terrible tax fellows might have tried to catch it and tax it, as they had the now worthless trust deeds and other papers, wisely "reinvested" it, by means of a similar loan with like security and conditions as the first. This, however, made no difference to the Woodbury officials, for they coolly added a small sum, say \$2,000, to represent the increase of the sum by interest, perhaps, and taxed Mr. Kirtland, in 1870, on \$20,000.

There exists in Connecticut, doubtless, as in most, if not all, the other states of the Union, local provisions of law

which require every citizen to make an annual exhibit of his taxable property, and prescribe the manner in which it shall be done. Every reader is, no doubt, familiar with the printed blanks customarily used by the revenue officers to ensure this result, enumerating the different kinds of property possessed by the citizen, the blank spaces representing the specific amounts of each species, to be filled out by the taxpayer, and, following all, the oath averring that the schedule thus filled out is a true exhibit of his taxable property of every description. The question most naturally arises, with reference to the case we are considering, whether Mr. Kirtland (to whom we mean not the slightest disrespect, and whose case and experience, having become public property by the publication of the article we have been reviewing, we are entitled to use in illustration), if he was called upon to fill out and swear to such a schedule, undertook to decide for himself a question which it would seem is yet to be passed upon by the highest judicial tribunal of the country, viz.: Whether or not his money was property subject to taxation, and, having decided it in the negative, filed his schedule without including in it the Chicago loan. He must have done so, as the facts show that the Woodbury officials operated upon an estimate made by themselves in accordance with the statute. This question, most naturally, again suggests a far more important one, viz.: How many of the capitalists of the country, great and small, have adopted the same course, and what is the aggregate amount of the righteous taxes they have thus been enabled to evade from year to year, simply because their property consisted of money loaned out at interest, instead of partaking of such character as that it could not easily be concealed from the eye of the law? If even only those whose money is loaned in a different state from that in which they live have been thus careful to exempt it from just taxation, what must be the aggregate consequences resulting to the revenue of the states in which they have the honor to reside?

It is well known that nearly all of the new Chicago has been magnificently rebuilt upon capital borrowed from the

eastern cities. Does none of this enormous value contribute to the just and proper burdens of the states from whence it came? If not, then Mr. Kirtland has "builded better than he knew," and unconsciously opened the door to such investigations of the internal polity of the states as may greatly help to elucidate the current problems of "state debts," "hard times," and "financial depression."

TALLAHASSEE, FLA.

CHAS. A. CHOATE.

*VII. BOOK REVIEWS.***A DIGEST OF THE CRIMINAL LAW (CRIMES AND PUNISHMENTS).**

By SIR JAMES FITZ-JAMES STEPHEN, K. C. S. I., Q. C. St. Louis: Soule, Thomas & Wentworth. 1877.

This strikes us as a remarkable book, and its publication as an event in law-book making. The labor bestowed upon it is evidently in inverse ratio to its size. Its highly accomplished author has spent years of skilful, painstaking, and conscientious work in its preparation. This is apparent upon every page of the book. Power of correct statement and consecutive thought, clearness of analysis, felicity and strength of generalization, are characteristics of the author displayed in this work.

In size the book is not large. It is a neat, handy volume of 400 pages, printed on firm, white paper, in clear, new type. In its mechanical execution it is a beautiful specimen of neat and tasty book-making. It is published here in the city of St. Louis by the enterprising law-book and publishing house of Soule, Thomas & Wentworth, simultaneously with its publication in London by Macmillan & Co. This is the result of an equitable financial arrangement with the author and London publishers, as honorable to the publishers here as it is unprecedented in the law-book line. All affect to believe in the justice and expediency of international copyright. But the acts of law-book publishers in this country, and in England too, we suppose, proclaim a different doctrine. It is to be hoped that our St. Louis publishers may succeed in their venture. And they surely will, if the demand for the book shall be in any way proportionate to its merits.

The work is meant to be a complete statement of the whole of the working criminal law of England (as distinguished from the law of criminal procedure) which is dealt with in the text-books in common use, such as Russell on Crimes, Roscoe's Criminal Evidence, Archbold's Criminal Pleadings, and the like, and with some others which for various reasons they omit. The author says that "any offence not mentioned in these works would be rather a historical curiosity than a matter of practical importance.

I fear, indeed, it will be found that the contents of my book err rather on the side of excess than on the side of defect. They include a great number of offences which have, on various grounds, become obsolete, and which ought to be repealed."

The American lawyer or reader may say: Acknowledging all this, and that the book may be invaluable to the English lawyer or reader, as it undoubtedly is, yet how can it be of practical value to us? Is it not a statement of the English criminal law as it exists in their statutes and decisions? True; but it must be remembered that we derived our criminal, as well as civil, law from England, and that those statutes and decisions form the basis of our criminal law to-day. In the main, English criminal statutes are declaratory of the common law, and are the same as our own. They agree in spirit and substance, so far as our altered conditions will admit. Where they have improved by statute upon the common law, we have usually found it expedient to do the same, and have followed in their footsteps. Where we have made a step of improvement in advance of them, they have been quick to follow us; and to-day the criminal statutes and the decisions of their courts and the criminal statutes and the decisions of our courts are, in the main, harmonious. We daily cite their text-books and decisions in our courts to illustrate, and assist us in administering and understanding, our criminal law; and, as this digest states and illustrates the criminal law, so will it illustrate and assist us in systematizing and more clearly comprehending our own.

It is a practical book. If Russell on Crimes, with its 2,700 pages, Archbold's Criminal Pleadings, with its 1,012 pages, and Roscoe's Criminal Evidence, with 1,002 pages, all closely printed, and all stuffed with English statutes and decisions, are practical books—and that they are, is acknowledged in all the courts of this country—then is this emphatically a practical book, for all that is contained of criminal law in those works is condensed and illustrated in this. Every important principle found in either of them is clearly stated in this. The author clearly recognizes the fact that the law does not consist of particular cases, but of general principles, which are illustrated and explained by those cases. There may be hundreds of cases that have been decided upon a principle which every case in some way recognized. It would take many pages merely to give a syllabus of the cases, while the principle around which they all cluster, and which they illustrate, may be clearly stated in a few lines. And the comparative brevity

of this work, the author tells us, has been obtained by the double process of extracting principles from cases, the facts being stated in the form of illustrations of the principles, and condensing the statutes. This process of extracting principles from numerous cases is no easy task, and could only be done, as it has been done in this work, by the best trained professional skill, joined with high and rare qualities of mind.

The extraction of principles from decided cases forms only one branch of the process of making such a digest of the law as this. It is necessary, in addition, to perform a similar operation upon the statutes. The author claims that about one-half of the criminal law of England is contained in different statutory enactments. The same may be said generally of the criminal law of every state in the Union. Every state has its code or body of criminal law. As a whole, these enactments of the different states are alike, differing only in some of their details. But all these statutes are to be interpreted and administered in connection with the other part of the criminal law which exists in the unwritten or common law.

The manner in which the digest of the statutes has been executed in this work is worthy of all praise. The author has made what, in them, is complicated and confused, plain and simple, and easily understood. He has brought order out of confusion, and light out of darkness. We will let him describe in his own way some of his difficulties, and how he dealt with them. And it is well to remember that what he says about the absurd manner in which English statutes are drawn will apply with equal force to the statutes of our own states:

“The style of the acts is no less unfavorable to those who might wish to derive information from them than their length and arrangement. Acts of parliament upon the model of deeds, and both deeds and statutes were originally drawn up under the impression that it was necessary that the whole should form one sentence. * * * The effect of this rule of style has been to cause the sections of an act of parliament to consist of single sentences of enormous length, drawn up, not with a view of communicating information easily to the reader, but to preventing persons bent on doing so from wilfully misunderstanding them. The consequence is that sections of acts of parliament frequently form sentences of thirty, forty, or fifty lines in length.

“The length of these sentences is only one of the objections to-

them. They are as ill-arranged as they are lengthy. * * * The definition of the offence is interposed between the nominative case, 'whoever,' which stands at the beginning of the section, and the verb, 'shall be guilty of felony, and shall be liable, etc.' As the definition generally contains qualifications of various kinds, and in many cases long lists of words almost, if not entirely, synonymous, the result is that, when the reader has arrived at about the middle of the sentence, he has forgotten the beginning of it, and finds himself involved in a multitude of words the grammatical connection of which with each other is often obscure and doubtful, even on the most careful and patient examination. Of course an act of parliament is made to be studied, and not to be skimmed like a newspaper or novel, and a student will see that many things which look like mere verbiage are really essential to the subject; but precision and explicit statement are so far from being irreconcilable with liveliness and perspicuity of style, that they may render those qualities doubly important. If you have to state a mass of uninteresting details, and if you wish to make them as little repulsive as possible, the least you can do is to put the nominative case near the verb, to put the rule first, and the exceptions afterwards, and to avoid saying the same thing over more than once when there is no necessity for doing so. The subject may be dull, but the style may be lively. Each word may add to the sense and be put in the right place, whether the subject in hand is *Paradise Lost* or the *Statute of Frauds*. * * * In this digest I have attempted to give what I may call a literary form to the acts of parliament which contain the criminal law, and especially to the consolidation acts. I have tried to give the precise effect of each enactment in the form which the author of an original work would give to his matter, having regard to the convenience of his reader. I offer the digest, in short, as a literal translation of the acts into the language of common life."

This undertaking has been eminently successful. The result has been to give the point of the sentence at once, and often to save as many as nineteen or twenty repetitions of long and wearisome forms. But any one to fully see and feel the effect of this arrangement must turn to the book itself. He will there find exemplified on every page the wonderful success and skill displayed in abridging without weakening or excluding anything necessary to a complete and exact statement of the subject treated. By going through

the criminal statutes of England in the way indicated by the author, he has succeeded in giving so much of them as relates to the definition of crimes in much less than one-half the space which they occupy in the statute book, and in a form which contains nothing repulsive to the reader ; and, at the same time, by interweaving the common law with the statute law, and bringing the two into their proper relation, he has made the general nature of the system, and the plan upon which it is arranged, intelligible to any person of ordinary understanding and perseverance who cares to study the subject.

But, while the book is a practical one, and may be usefully consulted by any lawyer, having a criminal practice, continually, yet in our opinion its highest merit consists in its being a magazine of suggestion and example. The criminal law of most of our states has all the substantial merits that can be claimed for any body of jurisprudence, except system and arrangement. With this book as an example, we believe that the criminal law of this or any other state may be reduced to a short and systematic form. With the method suggested by this book, any lawyer may take any statute, however complicated and confused, and reduce it to a simple form that may be easily understood by the plainest juror. This book will be of the greatest importance to the law-maker. It is the best practical advance to a satisfactory penal code we have ever seen. The criminal law of this country and England is ripe for codification, and the author confesses in preparing this digest he has intended it to serve as the first step towards the enactment of a penal code. Any one who will read his admirable preface to this work cannot but acknowledge that his views concerning such an undertaking are prudent, practicable, and wise. They are well worthy the careful consideration of the best minds of the profession.

We cannot refer here at any length to particular parts of the work, and point out the excellence of their execution, but would like to call attention to Chapter XIV, which treats of "misleading justice, perjury, false swearing, subornation;" also, Part V, which treats of offences against the person. This part of the work, together with the note in the appendix upon it, is alone worth the price of the book, several times over, to any criminal lawyer. Also, Part VI is of especial interest to the profession. But where all is so good it is useless to refer to particular parts. It is a book containing much in little space. It is a practical book, also, full of

suggestion, invaluable as an example or model to use in systematizing the criminal law of any state. It is the matured product of a well trained, large, practical, and rare mind, and it is to be hoped that it will meet with the success that it deserves.

J. G. L.

PROFFATT ON NOTARIES. A Treatise on the Law relating to the Office and Duties of Notaries Public throughout the United States with Forms. By JOHN PROFFATT, LL. B. San Francisco: Sumner Whitney & Co. New York: Hurd & Houghton. Cambridge: The Riverside Press. 1877.

Mr. Proffatt's monograph disposes, in 165 brief pages, of the subject of "notaries public," including therein chapters referring to "commissioners of deeds" and "acknowledgment of deeds." We are not sure that we can properly classify this book. It is not clear whether the author intended to write a legal treatise, or merely a manual for notaries and commissioners. The latter is indicated by his 150 pages of forms of acknowledgments, affidavits, depositions, and legal instruments. But the preface intimates that the work is expected to be useful to the legal profession also. It says: "The chapter on Negotiable Paper has received the author's most careful attention, and it has been his aim to make it complete, practical, and useful to notaries, to whom are confided the responsible duties of protesting negotiable paper. He has, at the same time, endeavored to extend its utility by citations of cases, so that it may be of use to the practising lawyer. * * * The chapter on Notarial Acts as Evidence, the author believes, will be found of great advantage, not only to notaries, but to the legal profession. It is the first time that the cases on this subject have been brought together, classified, and digested." Perhaps the author's intention was to furnish a book of such mixed character as to be useful, at once and equally, to lawyers and to notaries; for he aims to supply to the latter "that information which will enable them to discharge their duties safely to themselves and efficiently to the public." It may be doubted whether any attempt to produce a work of such mixed aims and composite character can be successful. American notaries, in general, are not lawyers, and there can be little reason why they should understand the legal principles involved in their official acts. "Theirs not to reason why;" the manual will suffice for them, which, as a general rule, instructs them simply what to do. The lawyer, however, is concerned with the reasons of the

same regulations, the causes which led to their adoption, and the principles involved in them.

We do not find Mr. Proffatt's volume a ~~success~~ in either respect. It is far from exhaustive, though containing citations from nearly a thousand cases; ~~and~~ exhaustive it certainly should be, upon so ~~limited~~ a subject, to satisfy the practising lawyer. With much matter that is useful and valuable, some of which is doubtless collected now for the first time, there are many statements of legal doctrine that are incorrect, or are made so carelessly as to be seriously misleading. Thus, it is said at page 28 that the effect of a formal acknowledgment of a deed is "to give a right to introduce the deed in evidence, as proof of a conveyance, and to give constructive notice to all who subsequently acquire the property, or any interest therein, of the prior sale or encumbrance." This sweeping statement takes no notice whatever of registration as a requisite to, and a means of, constructive notice. Indeed, we find the author ignoring the subject of registration almost wholly, although in many states the office of acknowledgment is principally to prepare instruments for registration.

Again, at page 110, the subject of protest is introduced with the statement that "a protest is a solemn official process *required* by the law merchant to properly authenticate the fact of the dishonor of *negotiable paper*." It is obvious that a protest is not process at all, in the technical legal sense of that term. We italicise certain words of the author's text to show how positive is the teaching here that the law merchant requires a protest as to all kinds of negotiable paper. But the author has elsewhere casually observed that such a requirement is made only as to foreign bills of exchange (p. 140), and that protest is not necessary in cases of notes and inland bills, though it *may* be made in such cases (p. 111); and has called attention to judicial efforts tending to place all foreign notes on the same footing, in this respect, as foreign bills (p. 112).

Out of the necessity for some international means and mode of notice of dishonor of foreign bills grew the rule above referred to, requiring a protest, and also the common-law doctrine referred to by Mr. Proffatt (pp. 136, 137), that the acts of a notary, by the laws of nations, have credit everywhere. But he makes no especial note of the fact that this international credit has reference to foreign bills of exchange; though he has elsewhere observed that the powers of notaries in respect to negotiable notes and inland bills are derived from statutes, he does not clearly point out the

distinctions between the different classes of powers thus respectively derived. Perhaps no question concerning notaries could be of greater interest to the lawyer than that of the origin and intrinsic character of the authority which, it is conceded, notaries have, by international law, over protests of foreign bills. Scarcely any other public officer, by whatever name known, is accorded the same extent of foreign recognition. The origin and growth of this general official authority and recognition receive no attention from the author in his brief remarks upon the "history of the office," or elsewhere.

As a manual for notaries, the work is scarcely perfect or reliable. So much of the duty of the modern notary is derived from, and defined by, statutes in respect to which the several states are entirely independent of each other, that the notary must in each state consult and be guided by local statutes. These are, in this book, given severally and substantially, so far as concerns acknowledgments and notarial seals, with some statutory provisions as to days of grace, acceptance, and notice. But, as to presentment and demand made by their clerks, notaries are informed that it is allowed in some states and disallowed in others, without a full statement as to the rule on this point in each state, which alone could furnish the necessary information to all notaries. As to affidavits, the authority to take which our author concedes to be purely statutory, certain apparently general principles concerning form, venue, signature, jurat, and seal are apparently deduced by him from a few scattering decisions in different states, each of which must, of course, be of only local authority and effect. The salutary rule that "diligence" is a question of law for the court, and that a notary, in his certificate of protest, should not allege "due diligence," but state merely the facts as to his acts, receives attention from our author only in the inferior position of a footnote. The synopsis of the statutory regulations of the several states concerning acknowledgments includes references to the case of married women's property generally, but none whatever to their separate estates, as to which special statutory rules are often interposed by the state legislatures. No reference is made, either in the text or the forms, to the requirement of some states that a certificate of the clerk of a court of the county, to the official qualifications of the notary, must be attached to the latter's certificate of acknowledgment before the instrument thus acknowledged can be entitled to registration. These are patent defects in a work

designed for the guidance of ministerial officers, such as notaries and commissioners. We can scarcely conceive that the book will be as useful as Hubbell's Legal Directory to this class of officials. We fear the deficiencies we have noted indicate great haste to bring out, during the present year and without sufficient preparation, a book to follow Brooke's English work of last year, entitled "The Office and Practice of a Notary of England."

We would not have our readers understand, from the recitals upon the author's title page, above quoted, that they will find in this book the typography of The Riverside Press. We regret to see the practice initiated—and trust it will not be continued or become common—of putting the imprint of that celebrated press upon a book presenting only Californian typography, though creditable in itself, as it is in this instance. P.

JURISPRUDENCE, AND ITS RELATION TO THE SOCIAL SCIENCES.
By DENIS CAULFIELD HERON, Q. C., Member of Parliament for Tipperary. San Francisco: Sumner Whitney & Co. New York: Hurd & Houghton. Cambridge: The Riverside Press. 166 pages.

This small volume contains chapters on the social sciences—ethics in relation to jurisprudence—and a historic review. These consist in definitions, in which the author seems to be unusually happy, and general disquisitions on the reforms that have been made in the law, its present condition, and probable future—his prophecies as to the latter being of the most hopeful kind. He thinks that our modern civilization only dates back about two hundred years. Law reform is a thing almost of the present generation. The apostles of that reform perished with contumely and neglect; but now they number among their disciples the whole legal profession in England. All branches of learning are giving each other the hand, and they are working together in conscious sympathy. Political economy and ethics are laying up the materials from which a true science of jurisprudence will be elaborated. Men will eventually learn what the law can do, and the situations in which it must fail; it will be no more put upon impossible tasks, and the best method of obtaining its highest results in its application to the diversified affairs of life will be approximately ascertained. The law will become simpler, easier of comprehension, and far more effectual as an instrument of protection, and as an element of progress, than it has heretofore been. Thus the author takes a pleasing view of the prospect. The evidences

from which he draws his conclusions may not be perfectly convincing to every mind; but he invites us to occupy an elevated position, far above the malaria that surrounds us at present; whence, when the weather is unusually fine, we may chance to catch a glimpse of the promised land. The eyes that enjoy a near view of its glories shall be for some ages unborn. As for us, who have been in Egypt, we shall in no case enter in. For a long period the wind will blow somewhat chill around the fatherless biped; he will be fain with his hands to make himself clothes to keep himself warm; to take elixirs to keep himself alive; and he will find the law, whenever he has occasion to consult it, to be "mightily mixed."

Mr. Heron does not counsel any sudden or heroic measure of law reform; he trusts rather to the slow, but sure, effects of a gradual accumulation of knowledge. He is not an advocate of codification; on that subject he leaves out some of the strongest arguments, perhaps as being too trite, and includessome of the weakest—such as the crotchet of Savigny, that there is a necessary connection between a code and national decay, and that the former portends the latter. Savigny said that Rome made a code, and that Rome never prospered afterwards. Mr. Heron says also that France compiled a code, and that France has never flourished since. If it is rather early to number France with the dead nations of the earth, it is somewhat surprising to learn that all her misfortunes have come from the fact of her having arranged her laws in a book. But Prussia also has a code. It is said to be four times as big, and eight times as clumsy, as the French code. Is Prussia also effete? Nearly every country in continental Europe has done something towards codification. If they are all destined on that account to degeneracy, the legal millenium may be even further off than the author supposes. Probably the true cause of decline has been misunderstood. Probably there is something unlucky in building a public building in a certain form, and calling it a pantheon. Rome never increased in power after her pantheon was erected. France has built a pantheon, substituting the dust of Rousseau and Voltaire for the deities of ancient mythology; and now France is declining likewise. One argument of this kind is just as good as another. Such puerile vagaries are beneath the importance of the subject. Savigny used them because his book, called "The Vocation of the Age," was addressed to the populace.

Many readers, too, will differ with Mr. Heron in his historical

estimates; very many will not be able to see that the "so-called Dark Ages" have been inappropriately named. The great names recited will call forth but little applause. Many will be ready to decide that Duns Scotus was a failure, that Abelard was a pious fraud, and that Albertus Magnus was a dreary pedant. Their everlasting dialectics added nothing to the sum of human knowledge, and hence their voluminous works have been handed over to the worms and to oblivion. The intimation that the church, during that period, was actively promoting secular science is founded on a mistake. The church had its virtues, but they were not the virtues of the nineteenth century. These did not exist. The scholars were as intolerant as the church. Whoever dissented from the Aristotelian system of reasoning was at once marked as a man towards whom no mercy was to be shown. The author says that an acute and penetrating logic, like the sword of the angel at the gate of paradise, guarded the sanctuary of truth. The simile is correct; for the sword referred to was used to keep Adam *out*. The bitterness with which the learned hounded Ramus until he was assassinated differed in nothing from the bitterness which led Bruno to the stake. Indeed, there was such a fearful amount of ignorance, blindness, and cruelty in that evil time on all sides that, if we are going to forgive at all, we need not be particular where we begin. To lay the faults of the period at the door of any party alone is an egregious, though common, error. Between the violent school of modern invective, and the apologetic platitudes of Schlegel's History of Civilization, there is a wide and tenable ground.

Notwithstanding faults of this kind, Mr. Heron's book may be read with profit. It contains a good many valuable suggestions, and is usually quite up to the level of modern thought. The materials used by him are capable of indefinite expansion; for he deals with a great subject, and in a manner not wholly unworthy. Occasionally the reader will find something to indicate the nationality of the writer, as when he tells us that "there is in nature *one uniform variety*." The following extract exhibits a still better specimen of the Irish bull: "Mental philosophy has been divided into two parts; one treats of man in his individual capacity; the other of man as a member of society. But these parts are divided by an *uncertain line*, and each encroaches upon the *distinct* province of the other."

CASES ARGUED AND ADJUDGED IN THE COURT OF APPEALS OF THE STATE OF TEXAS DURING THE AUSTIN AND TYLER TERMS, 1876, AND THE GALVESTON TERM, 1877. Reported by JACKSON & JACKSON. Vol. I. St. Louis: Soule, Thomas & Wentworth. 1877.

This volume of the reports contains 789 pages, and is composed entirely of criminal cases decided by the Texas court of appeals since May, 1876. It is published by Soule, Thomas & Wentworth, of St. Louis, and is a credit to their enterprise and good taste. The material used is first class. It is well printed and well bound, and presents a handsome appearance. It will compare favorably with the best published reports of this country, while it is far superior to most of them.

The reporting appears to be well done, although, in a few instances, it would have been better not to have copied at such length the briefs of counsel. Reports are multiplying so fast that all the profession can well endure is to buy the opinions of the judges. At the same time, it must be admitted that some of the briefs contained in this volume are very ingenious and creditable to the Texas bar.

The court of appeals of Texas owes its origin to the new constitution of Texas, adopted by the people in February, 1876. The court was organized in May, 1876, and has evidently had all it could do ever since. And the mere fact that this volume of cases is the result of one year's work of the court on the criminal side of their docket alone leads us to suppose that many cases had accumulated in the supreme court of the state awaiting decision at the time of the organization of this court.

The judges of the court seem to be men of learning and ability, as gathered from their decisions in this volume. They express themselves with force and clearness, and appear to be masters of criminal law as administered in this country and in England. We see nothing crude or ill-digested in the book. Some of the opinions strike us as very able.

One thing in particular has attracted our notice, and that is the firm, judicial manner with which this court arrays itself against all looseness, carelessness, and irregularity in the trial of persons accused of high crimes. And they have had a great deal of that kind of practice to suppress in that state. Any one looking through

this volume will be struck by the great number of cases "reversed and remanded" on account of errors committed by the trial courts.

Especially is this so in the more important cases of murder and kindred crimes. There is entirely too much of this kind of error in the trial courts of our western and southern states. By it justice is delayed, and the people come to think that the law is but a tissue of tricks; and that, if a criminal will only employ a lawyer that knows the most of them, he will get off in the end. Certainty of punishment for the crime committed, more than the severity of it, is the best guarantee of the peace and security of society. And, if this certainty is not felt, the judges who try criminals are more responsible for it than any other class of persons. Their carelessness is the rogue's immunity. The criminal law is too well settled to allow of excuse for so many errors committed by courts upon the trial of offenders. But, if errors are committed, there is no way but to correct them fearlessly, no matter what the consequences may be, and this the court of appeals of Texas has done.

This volume will commend itself to the favor of the profession throughout the country as much as any other volume of reports emanating from any court of the state of Texas. To the Texas lawyer it will, of course, be indispensable. As is well said in the preface to the volume, "not merely to the practising lawyer, but also, and more especially, to all judges, prosecuting attorneys, district and county clerks, justices of the peace, and, in short, to all functionaries in any degree charged with the administration of criminal law of the state, the reports of the court of appeals are, or should be, a necessity."

We will call attention to but a very few of the cases contained in this volume. They range over almost every department of the criminal law. We notice in the case of *The State v. Dill et al.*, page 278, it is decided that an accomplice must be corroborated, not merely as to the *corpus delicti*, but also as to the complicity of the accused. In other words, that no alleged criminal can be convicted in the state of Texas upon the uncorroborated testimony of an accomplice. This is not the law in almost all the states. The point was ably discussed, and acquired great prominence, in the "whiskey conspiracy cases" tried in the United States courts here in St. Louis. The law would seem to be pretty well settled that, while it may be unsafe under most circumstances for the jury to convict the prisoner on the sole testimony of an accomplice, unsupported by other evidence, yet there is no rule of absolute law on

the point; and, if the jury believe the accomplice, and find a verdict on his sole testimony, such verdict is not erroneous or bad in point of law. As a matter of sound practice, however, as observed by Mr. Bishop, the judges usually deem it incumbent on themselves to caution the jury of the danger of finding a verdict on such testimony unless in some way supported, either by direct evidence from an uncorrupted source, or by matter which in some other way appears in the particular case. The cases of *Johnson v. The State*, page 333, and *Black v. The State*, page 368, especially the latter, where it is decided that, at a second or subsequent trial of a criminal charge, it is competent for the prosecution to put in evidence the testimony given at a previous trial by a witness who has since died; and such testimony may be proved by a person who heard it given, and who can qualify himself to state the substance of it. Such evidence is not in contravention of the constitutional rights of the accused to be confronted by the witness for the state.

We would like to refer to many other very interesting cases decided in this volume, but must forbear. J. G. L.

MINNESOTA REPORTS. VOL. 22. Cases Argued and Determined in the Supreme Court of Minnesota. May, 1875—May, 1876. GEORGE B. YOUNG, Reporter. St. Louis: Soule, Thomas & Wentworth. 1877.

The present volume contains a good many cases of general interest. The following may be named: In *First National Bank v. Rogers* it is decided that where a plaintiff levies on land, supposing it to be the property of the defendant in the execution, buys it in for the amount of his judgment, upon which he enters satisfaction, and it turns out that the land belongs to a third person, the plaintiff may, by an equitable proceeding, have the entry of satisfaction set aside, and may have a new execution, the defendant not having been injured by the sale, and no rights of third persons having intervened. In *Jordan v. Henry* it is held that a justice of the peace cannot issue a search warrant to search for his own property; that a warrant thus issued is void, and is no protection to the officer executing it. In *Berkey v. Judd* it is held that, in an action founded on fraud, constructive notice alone of the facts constituting the fraud, such as the record of a deed in the register's office, is not sufficient to set the statute of limitations in motion.

In *Cotton v. Mississippi Boom Company* the case was this: The defendant company had been chartered before the adoption of the present state constitution, with a prescribed duration "for the period of fifteen years." The present constitution prohibits the formation of corporations under special act. After its adoption the legislature amended the charter of the defendant by striking out the words "for the period of fifteen years." It also changed the form of proceedings for the condemnation of property under the charter. The court held that neither of these amendments was an infringement of the constitution.

In *Rogers v. McCauley* the court held that where a debtor had fraudulently caused land to be conveyed to his wife, paying for it with his own money, and had made his home on it, the conveyance might be set aside, and that the wife of such debtor could not claim a homestead on the land. The court said: "He could claim no rights in this lot as a homestead, for he did not own it. She, having acquired it by gift, from her husband, made in fraud of his creditors, took it subject to their rights, and no homestead right in her would protect it against those rights. The homestead laws were not enacted as a shield for any such transactions." This holding is not inconsistent with the ruling in *Cox v. Wilder*, 2 Dill. 45, where it was held that a wife would not lose her right of dower, and, *arguendo*, a homestead right, by joining with her husband in a fraudulent conveyance. The law would seem to stand thus: The wife will not lose her rights by joining in a fraudulent conveyance which is afterwards set aside, but she cannot acquire a right where she has to trace her title through a fraudulent conveyance to herself.

A very sensible ruling is made in *State v. Lee*, where the court say that negative evidence of character is competent. For instance, the testimony of a witness who swears that he has been acquainted with an accused person for a considerable time, under such circumstances that he would be more or less likely to have heard what was said about him, and has never heard any remark about his character; the fact that one's character is not talked about at all being excellent evidence that he gives no occasion for censure, or, in other words, that his character is good.

In *Pence v. Arbuckle* the court held that where one has executed a deed in which the name of the grantee is left blank, and delivers it to an agent with authority to fill in the name of a purchaser of

the land named in the deed, and the agent fills in his own name, the grantor will be estopped from setting up these facts as against an innocent purchaser who has bought supposing the conveyance to have been properly executed. In *Orr v. Box* it is held that one who absconds from the state cannot have the benefit of laws exempting certain personal property from sale under execution. In *Stocking v. Hanson* it was decided that if a defendant is duly served with process, and afterwards dies, and judgment is rendered then against him, there being no revival as against his personal representatives, the judgment is not void when collaterally attacked, but only voidable when properly assailed. In *Hostetter v. Alexander* it is held that the privileged character of a negotiable note does not extend to a mortgage by which it is secured. This is directly the opposite of the decision in *Carpenter v. Longan*, 16 Wall. 271. But the Minnesota court followed a still older decision of its own. The opinions are short and very clear. The work of the reporter is very well done, and the mechanical execution of the volume is good.

REPORTS OF CASES IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI. By HARRIS & SIMRALL, Reporters to the Supreme Court. Vol. LII. Containing Cases decided at the April and October Terms, 1876. St. Louis: G. I. Jones & Company. 1877.

Among the cases of general interest reported in this volume the following may be mentioned:

In *Shackleford v. Mississippi Railroad Company* it was held that, where a suit is pending against a railroad company at the time that the company consolidates with another railroad company, the plaintiff has a right to prosecute his suit to the end against the company made a defendant, without noticing the consolidation. The court say that the act of the legislature, authorizing the consolidation, cannot defeat or prejudice the right of the plaintiff in such case, nor can the defendant, by taking advantage of such an act, in any manner embarrass his remedy.

By statute, in Mississippi, a married woman engaged in trade or business, as a *feme sole*, is bound by her contracts, made in the course of such trade or business, in the same manner as if she was unmarried. In *Netterville v. Barber* the court held that contracts of this kind are not to be looked on with suspicion; that, if a mar-

ried woman has the power to make contracts, she, like others, must take the risks of her business transactions; and that the law will not intervene to relieve her from the consequences of her mistakes, misfortunes, or follies.

In *Polk v. Supervisors* it is held that an action will not lie on a county warrant, it not being, of itself, evidence of a debt; and that the plaintiff in such case must set out the facts which authorized the issue of the warrant.

In *Franklin Insurance Company v. Taylor* it was held that equity will compel the issue and delivery of an insurance policy after a loss, and will enforce the payment of it, where there has been a valid agreement for a policy before the loss; and this although the agreement was by parol, and the charter of the company requires all its policies to be in writing.

In *Horne v. Green* it was decided that national bank-notes are obligations of the national government, and are, therefore, exempt from state taxation. The opinion is not given in full. A synopsis says that "the national bank-notes issued by the National Banking Association, under authority of Congress, are also obligations of the national government; the only difference between them and the legal-tender notes being that the government is primarily liable for the latter, and secondarily liable for the former, upon the failure or default of the national bank issuing the notes." This ruling will not meet with universal approval. In one sense the government may be said to be secondarily liable for the bank issues; but, as the government is always made amply secure from all loss by reason of such issues, it can hardly be said that the government is a sufferer by the failure of a national bank.

In *Bowers v. Andrews* it was held that an error in the description of land in a tax deed cannot be corrected in chancery, the tax proceeding being *in invitum*. In this case the land was described as "lot and residence in Madison Station," and it was sold for "the taxes assessed to the reputed owner thereof, Thomas McMahon." The latter phrase was held not to be descriptive of the land sold, but expressive of the reason for the sale. The ambiguity was, therefore, held to be patent, and incurable by extrinsic evidence.

The work of the reporters is done with unusual care and fidelity. But, if they desire to be perfect, it will be well to eschew the word "issuance," which is said, on good authority, not to be of the Queen's English, but of some outside and questionable dialect.

The volume is handsomely printed and bound, and the decisions will not detract from the high character acquired by the court in the days when Sharkey was judge.

A DIGEST OF DECISIONS IN CRIMINAL CASES CONTAINED IN THE REPORTS OF THE FEDERAL COURTS AND THE COURTS OF THE SEVERAL STATES, FROM THE EARLIEST PERIOD TO THE PRESENT TIME. By THOMAS W. WATERMAN, Counsellor at Law. New York: Baker, Voorhis & Co. 1877.

Ever since this book was published we have had occasion to use it almost daily. In this way we have had occasion to test its accuracy and usefulness. And our experience has given us a very favorable opinion of the book. We have found it all it professes to be. It is an honest work. To any one who has a general knowledge of the vast number of criminal cases which have been decided in the "federal courts and the courts of the several states, from the earliest period to the present time," it would hardly seem possible that this volume could contain them all. Neither does it. Those left out, however—and they are a very great number—are those which, the author claims, involve no principle of interest, or are under such state laws as are constantly undergoing modification, or liable to repeal; those have for the most part been omitted. Of this character are cases in relation to local practice, or police regulation. All decisions growing out of the slave system, now that it has been abolished, have been left out (as it was thought they could now serve no useful purpose), except in a few instances where they determine points of law important by way of analogy. We have had occasion to notice that in the excluded cases are some that, on account of their importance, should not have been left out. But in a work of this extent it would be almost impossible to embrace every case that should be included, where any are by rule excluded.

Leaving out all the cases that come within the author's rules of exclusion, still the digest would not be able to contain the others had not the method been adopted of "bringing together under each head all the cases which support the same proposition, thus avoiding the needless reiteration of similar legal principles, and the systematic and orderly arrangement of the whole, with appropriate cross-references." Instead of making twenty paragraphs to state what is decided in twenty similar decisions, the author has

made one, and cited the twenty like cases under it. The statement of the points decided, of the cases digested, is made in simple and concise language, and without repetition.

The author is a man of much experience in book-making. What is needed in a digest of this kind is, first, a knowledge how to do the work required; and, second, an honest performance of the work in hand. We believe that these requirements have been fulfilled in this book. After an extensive examination, and lengthy practical use of it in examining criminal cases, we believe it is the best digest now extant of the American criminal law. Indeed, there can be no question of this. It is indispensable to the criminal lawyer. It is well written and well arranged. The index is good, and the typographical arrangement of the cases in separate columns is of great convenience and utility.

All that pertains to the mechanical part of the book is well done, and reflects credit upon the old and well-known house that publishes it. We say again it is an honest book, and worthy of the faith and patronage of the profession of the entire country.

J. G. L.

ABRIDGMENT OF ELEMENTARY LAW: Embodying the General Principles, Rules, and Definitions of Law, together with the Common Maxims and Rules of Equity Jurisprudence, as stated in the Standard Commentaries of the leading English and American Authors; embracing the Subjects contained in a Regular Law Course. Collected and arranged so as to be more easily acquired by Students, comprehended by Justices, and readily reviewed by young Practitioners. By M. E. DUNLAP, Counsellor at Law. Third Edition. St. Louis: Soule, Thomas & Wentworth. 1877.

However "readily reviewed by young practitioners" this book may be, it offers to others certain difficulties. In its form and general appearance it presents much the aspect of a small, plain black testament or hymn-book. On the first glance we were uncharitable enough to suspect that the learned author had gotten it up for surreptitious reading during the hours of morning service, for the use of the few wicked youth who may stray into the ranks of the profession; but, on a nearer view, we are glad to be able to acquit him of any charge of that kind. The book is just what it purports to be in its elaborate title. It consists of general definitions and rules of law, and has no citation of authori-

ties. It is a mere skeleton of the law, intended to help the student to see the framework of legal science. As to the utility of such abridgments, there has long been a difference of opinion which cannot be reconciled. The question is one that must be answered by every one according to his taste or temperament. The fact that this volume has reached a third edition is fair evidence that it has found a class of readers who have deemed it to be valuable. Their opinion is entitled to respect. If it renders the law susceptible of being "comprehended by justices," no one will deny its unusual and intrinsic worth. At the end of the volume the author appends various extracts from writers who have essayed to teach the young limb of the law the way in which he should go. It is to be hoped that he may take it to heart. Inspired by the example of these writers, the author adds a homily of his own, which contains a good deal of pretty fair divinity. The advice is of the best kind, and the student incurs the risk of recalling it in later years with some regret.

REDFIELD ON THE LAW OF WILLS. Vol. III. Third Edition.
Boston: Little, Brown, and Company. 1877.

This is the third edition of the last volume of Redfield on Wills. In the hands of the author it has been greatly improved and enlarged since its first publication. Large additions have been made, embracing a number of new titles, which will make the work not only more acceptable, but vastly more useful. It now comprises a very full consideration of the law applicable to the probate of wills and the settlement of estates, discussing, in separate chapters, the probate of wills, the appointment and duty of executors and administrators, the estate of executors and administrators, remedies by them, proceedings and remedies against them, gifts *mortis causa*, marshalling the assets, rights of the widow, allowances to executors, etc., and distribution, etc., guardianship, and testamentary and other trustees.

Its scope comprehends the entire proceedings in the probate court touching the whole matter of the settlement of estates. The English and American law on the subject is discussed with great clearness, and the principal cases fully collected. No book on the same question contains so much good law in a condensed form, and there can be no doubt regarding its great value.

D. W.

LOWELL'S DECISIONS. Vol. II. Judgments Delivered in the Court of the United States for the District of Massachusetts. By JOHN LOWELL, LL. D., District Judge. Boston: Little, Brown, and Company. 1877.

This volume contains judgments delivered in the district court of Massachusetts in the years 1871, 1872, 1873, 1874, 1875, 1876, and 1877. The cases principally relate to shipping, admiralty, insurance, and bankruptcy, though there are some interesting ones on corporations, equity, contracts, and commercial paper. They are reported by the learned and accomplished judge who presides over the Massachusetts district, and the volume presents a perfect model of neat and scientific reporting. There is no stuffing or padding in the book, and there is nothing superfluous about it. It is evident that the author has not embarked in the enterprise of simply making books to sell, where quantity is the main object sought, and quality is an inferior consideration. The conciseness of the reporting is admirable. The cases cover a period of seven years, and are selected with remarkable care and judgment; not a single unimportant one is to be found among them. The volume is an important contribution to legal literature, and, from the high authority of the court, and the general interest attaching to the nature of the cases, it will be found of great value.

D. W.

VII. NOTES.

ERRATUM.—By a typographical error the article on "Composition in Bankruptcy," in this number, is signed C. F. Bump. The author is O. F. Bump, Esq., the well-known writer on Bankruptcy, Fraudulent Conveyances, etc.

REMOVAL OF CAUSES.—We have received from A. H. Holmes, Esq., of New York, a copy of the opinion of Judge Miller, recently delivered at Denver, Colorado, in the case of Arapahoe County v. Denver Pacific Railroad, which involved the construction of the act of Congress of March 3, 1875, providing for the removal of causes to the federal courts. The opinion in full can be found in the current volume of the *Central Law Journal* (Vol. V, No. 5).

McKEE'S CASE.—On Friday last Mr. Justice Miller, of the United States Supreme Court, holding the September term of the circuit court in this city, rendered an interesting decision. William McKee had been tried and convicted of conspiracy to defraud the United States of the tax on distilled spirits, and had received a pardon from the President before the expiration of his sentence. District Attorney Bliss then instituted a civil suit for the penalties denounced by section 3296, Revised Statutes, on those who should aid and abet in the removal of distilled spirits on which the tax had not been paid, laying the damages at over \$3,000,000. The defendant pleaded *res adjudicata*—the prior conviction and judgment—and the pardon. On demurrer to these defences the court, after full argument, *held* that the pleas were good, that the former conviction was a complete bar, and the pardon a release from all punishment consequent on that conviction.

The court did not pass on the question whether Mr. McKee is still liable to the United States when he is sued on his common-law liability for the damages actually suffered by the United States, by reason of the conspiracy, while he was a member. The case decided was solely for *penalties* denounced in the nature of *punishments*, and not for reimbursement of damages, and the court treated the action as an attempt to inflict punishment anew that had been once assessed and once pardoned.

COMPOSITION IN BANKRUPTCY.—At the same time the learned judge gave another opinion of far more practical import. Ticknor & Co. had made a composition in bankruptcy at twenty-five cents on the dollar to unsecured creditors. One Paret was scheduled as a fully-secured creditor, and had notice of the proceedings. After the compromise was consummated, Paret

realized on his security by sale under a deed of trust. The proceeds fell short of the debt some \$6,000, and he sued Ticknor & Co. for this deficiency. They pleaded the composition, the security, and notice of the proceedings. On demurrer to this plea the court held that Paret was not limited to his security, but might realize on it at the proper time, and that Ticknor & Co. were liable to him, not for the entire deficiency, but for twenty-five per cent. of it, and Paret was to be treated as an unsecured creditor for the deficiency *whenever ascertained*. This view has not been entertained by the bar here, and will almost revolutionize practice in cases of composition in bankruptcy, and probably necessitate material amendments of the now vague provisions relating to compositions.

JUDGE DAVIS' SUCCESSOR.—We note with satisfaction that the tide of public opinion has recently set so strongly in favor of a southern appointee to the vacant seat on the Supreme Bench, that there is no doubt that a Southerner will be nominated. Of the names presented, the three strongest are: Chancellor Cooper, of Tennessee; H. V. Johnson, of Georgia; and Mr. Circuit Judge Woods. Of Mr. Johnson we know little as a lawyer; he is said to be a man of large ability. Judge Woods is an able man. His Circuit Court Reports stand well in all courts. His decisions give good satisfaction to the bar of his circuit, and we believe he is, personally, as popular in his circuit as Judges Drummond and Dillon are in their circuits. That is saying a great deal.

We accord the preference to Chancellor Cooper, however, for two reasons: His unsurpassed learning and ability as an equity jurist would add substantial strength to the already very able equity side of the court; while his extraordinary power of dispatching business would be of great assistance in the already crowded condition of the Supreme Court docket, and its constant and rapidly increasing press of business. Justice delayed is often as grievous to litigants as justice denied. Various expedients have been resorted to in order that the Supreme Court might clear its docket. The number of justices has been increased, and the amount involved in suits necessary to give the Supreme Court jurisdiction has been raised to \$5,000. Still, the evil is but partly remedied. Some substantial relief will be afforded if, in the filling of vacancies on the bench, due reference is had to the executive ability of the appointee. As now constituted, the Supreme Court get through an immense amount of business, and care should be taken that their efficiency in this respect is enhanced rather than impaired.

Above all, we want the appointee to be a lawyer, a jurist, a man who has devoted himself to the "jealous mistress" for a life-time, and *not* a politician. It is most essential to the well-being of this government that the judiciary, and especially the Supreme Court, should be above the suspicion of political influence. The Supreme Court suffered considerably by being drawn into the Electoral Commission, and, more than anything else, from the circumstances of the appointment of Justices Bradley and Strong, and from their previous political reputation.

IX. DIGEST IN BRIEF OF RECENT CASES.

REPORTED IN FULL IN THE LAW JOURNALS SINCE LAST ISSUE.

PREPARED BY S. OBERMEYER, ESQ., OF THE ST. LOUIS BAR.

[The object of this department of the REVIEW is to advise our subscribers of points decided in the latest reported cases, and to show where they can obtain, at very small expense, full reports of cases in which they have an interest. To this end the points decided are briefly and pointedly given, with the abbreviation and date of the journal where the case is reported in full. The price of single numbers of each journal is also given, which, remitted to the address given, will secure a copy of any desired issue.]

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Weekly Notes of Cases.	W. N. C.	Philadelphia, Pa.	Weekly.	20 cents.
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ADMIRALTY.—The remedy given to seamen by secs. 4546, 4547, of the Rev. Stat. U. S., as preliminary to the filing of a libel for wages, is not exclusive, but cumulative merely; A libel for seaman's wages may be filed, and process for the arrest of a vessel obtained without resort to the preliminary proceedings authorized by secs. 4546, 4547; Those sections examined and construed in connection with sec. 6 of the act of 1790 (Vol. 1, Stat. at Large, ch. 29, p. 181).—*Gibney v. Steamer Waverly*, U. S. Dis. Ct., E. D. Wis., C. L. N., July 28, p. 872.

— *Collision; Duty of steamer to avoid sailing vessel; Duty of vessel not to embarrass the steamer by a vacillating and uncertain course; Deference to judgment of mariner under such circumstances.*—*Marshall v. The Adriatic*, U. S. Dis. Ct., S. D. N. Y., Am. L. Reg., Aug., p. 491.

— *Employment of tug for towing vessels; Liability in cases of collision; Where there is a general employment, by a vessel, of a tug to tow her in and land her at the particular place designated, the tug necessarily undertakes to bring with it the necessary skill and ability to perform that service, and it has the right, and it is its duty, to direct the vessel being towed, in the management of her helm, so that she may aid in making the landing sought to be accomplished.*—*Smith v. Schooner Southwest et al.*, U. S. Dis. Ct., N. D. Ohio, C. L. N., Aug. 11, p. 885.

— *Held, that proceedings in rem in admiralty cannot be instituted by a party against an undivided interest of an owner in a vessel.*—*Manhattan, etc., Ins. Co. v. Five-sixteenths of Schooner C. L. Breed*, U. S. Dis. Ct., N. D. Ohio, C. L. N., Aug. 11, p. 885.

ADMIRALTY—Continued.

— **Maritime lien; Materials furnished in home port; Mortgage; Registry; Notice; Wages of watchman; There is no maritime lien for the premium due on a policy of insurance taken on a vessel by her owners.**—*The John T. Moore*, U. S. Cir. Ct., D. La., C. L. N., Sept. 8, p. 417.

BANKRUPTCY.—Adjudication—Effect of upon prior proceedings to foreclose mortgage.—Prior mortgagees are not necessary parties to a bill to foreclose a junior mortgage where the only object of such bill is a sale of the equity of redemption, and there is no substantial doubt as to the amounts due the prior encumbrancers; An adjudication in bankruptcy does not give the bankrupt court such exclusive jurisdiction over the property of the bankrupt as to prevent the entry of a decree of foreclosure on a bill filed prior to such adjudication; A pledgee of bonds as collateral to a loan is not deprived of his right to sell the same by any of the provisions of the bankrupt act, and a purchaser of such bonds, sold after the pledgor became bankrupt, holds them by absolute right.—*Jerome v. McCarter*, Sup. Ct. U. S., N. B. R., July 1, p. 546.

— **Assignee—Not entitled to fund in preference to representatives of deceased wife of bankrupt, in a particular case.**—Where a wife executes a mortgage on her separate property for the payment of the debts of her husband, who thereby receives a greater sum than he would be entitled to by the curtesy in the residue of the amount realized on a sale of the property under the mortgage after payment of the mortgage debt, the heirs or representatives of the deceased wife are entitled to the fund in preference to the assignees of the husband.—*Shippen and Robbins' Appeal*, Sup. Ct. Pa., N. B. R., July 1, p. 558.

— **Assignment—Fraudulent sale.**—An assignment for the benefit of creditors of "all goods, chattels, and effects, and property of every kind, personal and mixed," does not pass the real estate to the assignee. In a sale by an insolvent vendor, inadequacy of price is evidence of fraud, and the question of fraud, on such sale, should be left to the jury.—*Rhoads v. Blatt*, Sup. Ct. Pa., N. B. R., July 15, p. 82.

— **Assignment—Set-off.**—A voluntary assignee is a mere representative of his assignor, and takes his choses in action subject to any existing right of set-off. Where a bank has made a voluntary assignment for the benefit of creditors, a depositor may set off a balance of deposits due him against his note held by the bank at the time of the assignment.—*City Bank, etc., v. Sherlock*, Sup. Ct. Pa., N. B. R., Aug. 1, p. 62.

— **Assignment.**—Under the laws of Pennsylvania the assignee of an insolvent bank cannot accept, in payment of debts due the bank, a protested draft drawn by such bank upon another bank, and sold by the payee to the debtor.—*Baschore v. Rhoads*, Sup. Ct. Pa., N. B. R., Aug. 1, p. 72.

— **Assignment—Effect of bankruptcy proceedings upon.**—An assignee for the benefit of creditors under the state law does not occupy the position of a *bona fide* purchaser, and, upon the proper institution of bankruptcy proceedings in the federal court, the assignee under the state law may, before an adjudication in bankruptcy, be restrained by that court from disposing of the assets of the bankrupt.—*In re Jacob Skoll*, U. S. Cir. Ct., D. Minn., C. L. N., Aug. 4, p. 377.

— **Attachment—Lien of.**—Under the laws of Vermont an attachment of a debt by trustee process creates a lien on the funds in the hands of the trustee after service upon him, although no notice is given to the principal debtor; Such lien is a lien by attachment by mesne process, and will be saved when made the prescribed length of time before the commencement of the proceedings in bankruptcy.—*In re J. Q. A. Peck*, U. S. Dis. Ct., D. Vt., N. B. R., July 15, p. 43.

BANKRUPTCY—Continued.

— *Attachment—Dissolution of lien—Wrongful payment by debtor of bankrupt.*—An assignment to an assignee, duly appointed in the bankruptcy proceedings, dissolves the lien of an attachment levied within four months prior to the filing of the petition; A debtor of the bankrupt who has, in ignorance of the appointment of an assignee, paid the amount of his indebtedness to the sheriff, under an execution in the attachment suit, is not thereby relieved from his liability to the assignee.—*Duffield v. Horton*, Sup. Ct. N. Y., N. B. R., Aug. 1, p. 59.

— *Attachment—Lien of.*—Where an attachment upon property of the bankrupt for its full value is dissolved by an adjudication, a judgment creditor who has made a levy subject to such attachment is not entitled to priority as against the assignee; But, where a creditor has obtained a valid and effectual lien by attachment, and has prosecuted his suit to judgment, and made an execution levy, his lien under such levy is to be considered as prior in time to that of other creditors who have levied attachments in the meantime, and is not affected by the dissolution of the attachments.—*In re Steele et al.*, U. S. Dis. Ct., E. D. Wis., N. B. R., Aug. 15, p. 105.

— *Discharge.*—Where notice has been duly given by publication, a discharge will bar the claim of a creditor whose name was omitted from the schedule, or was not furnished to the marshal, where such omission was not fraudulent.—*Heard v. Arnold et al.*, Sup. Ct. Ga., N. B. R., July 1, p. 543.

— *Discharge—Fiduciary debt.*—Where the discharge of a bankrupt is brought into question in a collateral action, and the record discloses nothing on the point, the jurisdiction of the court granting such discharge will be presumed. *Prima facie*, a judgment upon a promissory note is not for a fiduciary debt. In an action to enjoin the collection of a judgment, on the ground that the debtor has been discharged in bankruptcy, a copy of the discharge need not be set forth in the complaint, but the discharge may be pleaded by a simple averment of the facts.—*Hayes v. Ford*, Sup. Ct. Ind., N. B. R., July 1, p. 569.

— *Discharge—Waiver of—Fraudulent assignment.*—A debtor who has been discharged in bankruptcy may waive the discharge and allow a judgment to be recovered against him for the original debt; Where the debtor has waived his discharge as a defence, it cannot be raised by one who is in possession of property of the debtor, transferred with intent to defraud creditors, in an action to set aside such transfer; The assignee is but a trustee for the creditors; While he holds the property a creditor may bring an action to set aside a transfer by the bankrupt as fraudulent, if he makes the assignee a party—if not, the defendant must set this up as a defect of parties; Upon the discharge of the assignee the property remaining in his hands reverts to the debtor without reassignment.—*Dewey v. Mayer*, Sup. Ct. N. Y., N. B. R., July 15, p. 1.

— *Discharge—Effect of as a defence.*—A discharge in bankruptcy cannot be set up as a general defence to an action by a creditor to set aside a conveyance in fraud of creditors, pending at the time of filing the petition, where such creditor has not proved his claim in the bankruptcy proceedings, and the assignee has not interfered in the cause in any way; But the discharge may be set up in such action in bar of a personal judgment against the bankrupt other than the subjection of the property and claims reached by the creditor's bills to the satisfaction of the judgment; A conveyance made in fraud of creditors is voidable, and not void, and the property embraced in it does not absolutely vest in the assignee as a portion of the bankrupt's estate; A cross-bill setting up defendant's discharge in bankruptcy is not defective in not making his assignee a party, where almost four years have elapsed since the appointment of the assignee, and he has made a final settlement and been discharged.—*Phelps v. Curtis*, Sup. Ct. Ill., N. B. R., Aug. 1, p. 85.

—Continued.

re.—A discharge in bankruptcy releases the bankrupt from liability on a guardian's bond.—*Reitz v. The People*, Sup. Ct. Ill., Aug. 1, p. 96; (continued) *id.*, Aug. 15, p. 97.

re.—*Debt created in fraud of Bankrupt Act*.—Where one purchases under a contract to pay cash on delivery, and, upon delivery, beyond the control of the vendor, and then refuses payment, such may be regarded as a fraud in the creation of the debt, under sec. 38 Bankrupt Act, and his discharge will not release him; Where a new payment is made after a discharge, such discharge will not preclude a discharge.—*Classen v. Schoeneman*, Sup. Ct. Ill., N. B. R., Aug. 15, p. 99.

re.—*Payment of thirty per cent. by bankrupt in voluntary case*.—Once of consent by creditors in voluntary cases, no matter when made, nor when the debts were contracted, the assets must pay thirty per cent. there can be no discharge; In compulsory cases, if otherwise provided, the bankrupt is entitled to a discharge irrespective of the consent of the creditors or the amount of his assets.—*In re Haviland Gifford*, U. S. D. Mich., N. B. R., Aug. 15, p. 185.

re.—*Books of account*.—Opposition to discharge; Keeping proper books of account; Construction of the statute; Applies only to merchants and clerks, who must be held to the utmost good faith in keeping an intelligent record of business affairs with that reasonable degree of accuracy to be expected from an intelligent man in business as a merchant.—*In re* Gifford, U. S. D. Mich., C. L. N., Aug. 25, p. 402.

re.—*Discharge of assignee—Counsel fees*.—The register cannot discharge the bankrupt the exemptions allowed by the 14th section of the Bankrupt Act; He direct the assignee in the matter; Exceptions to schedule of assets must be filed, when; Upon application of an assignee for discharge of fraud, preferred by a creditor, will be investigated; In such case; Costs and fees connected with keeping property subject to a lien will be allowed to assignee before satisfaction of the lien; Counsel fees for services rendered to the assignee in a contest between the latter and the lien creditor, respecting the same property, can be charged against the fund.—*In re Peabody*, U. S. Dis. Ct., D. Col., Sept. 1, p. 409.

re.—*Debt created in fraud of Bankrupt Act—Habeas corpus*.—Determination of what is a debt created by fraud in violation of the Bankrupt Act, 1117, Rev. Stat. U. S.; Arrest for a debt not dischargeable in bankruptcy; Federal court will not release such debtor on *habeas corpus*; Practice in federal court upon a writ of *habeas corpus* in case of this character; What evidence will be received; Force of the writ, 761, Rev. Stat. U. S., with reference to writ of *habeas corpus*.—*In re* Martin Alsberg, U. S. Dis. Ct., D. Del., N. B. R., Aug. 15, p. 116.

re.—*Voluntary conveyance—Judgment against wife of bankrupt*.—Where a member of a firm, which is doing a very large but failing business, withdraws over one-third of his share of the capital upon property which he conveys to his wife, but which appears to be a firm book as an investment of the firm until charged up to him by assignment by such firm prior to an adjudication in involuntary bankruptcy, held that such conveyance to the wife is void, and that the bankrupt is entitled to the proceeds of the property as against the mortgage creditor who has taken a mortgage thereon as security for his debt; Judgment *in personam* cannot be taken against the wife of a bankrupt, or against the value of real or personal property conveyed to her in satisfaction of her debt.—*Phipps v. Sedgwick*, Sup. Ct. U. S., N. B. R., Aug. 1, p. 116.

re.—*Voluntary conveyance—Knowledge of taker*.—In order to render void a conveyance by a bankrupt within four months of filing a petition

BANKRUPTCY—Continued.

with a view to give a preference, or other conveyance within six months, it must appear that the person taking it *knew* that it was made in fraud of the provisions of the Bankrupt Act in the one case, or to prevent the property coming to the assignee, or from being distributed under the act, in the other; A conveyance made to secure an actual loan is valid if made and taken in good faith; Neither bad faith nor its equivalent, conduct wanting in good faith, is to be assumed, but must be proved.—*Campbell v. Waite*, U. S. Dis. Ct., D. Vt., N. B. R., Aug. 1, p. 98.

— *Fraudulent sale under secs. 5128 and 5129, Rev. Stat. U. S.*—In a suit in equity brought by the assignee to set aside a sale as fraudulent under secs. 5128 and 5129, the bill must allege that the defendant *knew* that such sale was made in fraud of the provisions of the act, and such knowledge must be proved in the evidence taken in support of the bill.—*Crump v. Chapman*, U. S. Dis. Ct., E. D. Va., N. B. R., July 1, p. 571.

— *Judgment—Lien.*—A lien obtained under a judgment is not affected by proceedings in bankruptcy commenced thereafter; The fact that an appeal has been taken from the judgment does not alter the case, where no bonds have been executed by the appellant, as required by law.—*In re Gold Mt. Min. Co.*, U. S. Dis. Ct., D. Cal., N. B. R., July 1, p. 545.

— *Judgment—Fraudulent procurement of.*—Where one of the members of an insolvent firm, with knowledge of such insolvency, carries a message at the request of a creditor, although unwillingly, to an attorney, directing him to enter up judgment upon a judgment note which the firm had previously given, *held* that he thereby *procured* the entry of such judgment and the issuing of the execution thereon.—*In re A. Benton & Bro.*, U. S. Cir. Ct., E. D. Pa., N. B. R., Aug. 1, p. 75.

— *Judgment—Lien of.*—The lien given by sec. 266 of the Oregon civil code upon the docket of a judgment arises from the docket, and not the judgment; it is a strict legal right, and must stand or fall by the statute which gives it; The docket entry is not a part of the judicial proceeding which ends with the entry of judgment, and, therefore, such entry cannot be referred to for the purpose of supplying omissions or explaining ambiguities in the docket, but the latter must be complete in itself; A judgment which by its terms cannot be enforced against the property of a party cannot become a lien thereon.—*In re Hamilton Boyd*, U. S. Dis. Ct., D. Oreg., N. B. R., Aug. 15, p. 187.

— *Jurisdiction—Of state and bankrupt courts under sec. 5117, Rev. Stat. U. S.*—Where a decree operating as a lien upon defendant's estate has been obtained in a state court, and the defendant afterwards goes into bankruptcy, proceedings under state statute will not lie before a state officer against defendant for discovery of his estate similiar to those given by sec. 5086 of Rev. Stat. U. S.; They must be taken in the bankruptcy court; Where such proceedings are taken before a state officer, and the bankrupt is imprisoned by him, he will be released on *habeas corpus* by a United States court, where the decree of the state court is not for a fiduciary debt of the bankrupt; Section 5117 does not embrace the surety in a guardian's bond among those not released by a discharge in bankruptcy.—*Ex parte Taylor*, U. S. Cir. Ct., E. D. Va., N. B. R., July 15, p. 40.

— *Jurisdiction—Suit by assignee under sec. 5128, Rev. Stat. U. S.*—Under the amending act of June 22, 1874, the federal courts have exclusive jurisdiction over actions brought by assignees to recover property claimed to have been transferred by a bankrupt in violation of sec. 5128, where the value of such property exceeds \$500; By the act of June 22, 1874, the state courts were ousted of their jurisdiction over such actions pending before them at the time of its passage.—*Olcott v. MacLean*, Sup. Ct. N. Y., N. B. R., Aug. 1, p. 79.

BANKRUPTCY—Continued.

— *Limitations of suits by assignees—Commencement of suit.*—A suit by an assignee in bankruptcy, to collect debts or claims due to the estate, must be brought within two years from the time when the cause of action accrued to the assignee; Where an assignee filed his petition or declaration in a suit to recover such a debt within two years from the time when his right of action accrued, but gave directions to the clerk not to issue the summons, and such summons was accordingly not issued or served until more than two years from the time the cause of action accrued, *held* that the action was barred.—*Walker v. Towner*, U. S. Cir. Ct., W. D. Mo., C. L. J., Aug. 31, p. 206.

— *Limitations of suits by assignees—Suits by assignees, where to be brought.* The two-years limitation provision in the Bankrupt Act applies to suits by assignees to collect the debts and assets of the state, as well as to suits relating to specific property; Suits may be brought in the circuit courts of the United States, by assignees in bankruptcy, without reference to the amount or value in controversy.—*Payson v. Coffin*, U. S. Cir. Ct., D. Kas., C. L. J., Sept. 7, p. 220.

— *Partnership—Interests of individual partners and of firm.*—The sale, on execution, of either or both the partners' interest in the joint assets, gives to the purchaser only an interest in such assets as may remain after the payment of the partnership debts; The fact that the interests of both partners were sold on separate executions to the same purchaser can have no effect to enlarge the interest of either partner acquired by such purchaser on the separate sale of such interest, nor to discharge the assets from liability for the partnership debts; Premises used by partners for the purpose of carrying on their business, *prima facie* form part of the partnership property, but this presumption may be rebutted.—*Osborn v. McBride*, U. S. Dis. Ct., D. Cal., N. B. R., July 15, p. 22.

— *Partnership—Subrogation.*—Where a partnership of two partners in equal interest were bound, as a firm, as surety for a debt, and a decree was rendered against the firm for the debt, to be paid, and which was paid, out of the social assets, the firm having been dissolved, and a balance having been left due, but not ascertained by judicial judgment or decree, from one of the partners to the other, and the partner who owed the balance having, after all this, gone into bankruptcy, *held* that the solvent partner had no right to be subrogated to the rights of the creditor of the firm who obtained the decree, for half the amount paid, against the individual estate of the bankrupt partner, as against other creditors of that partner.—*In re G. W. Smith*, U. S. Dis. Ct., E. D. Va., N. B. R., Aug. 15, p. 118.

— *Preference.*—The exchange of a mortgage for notes, in pursuance of a parol contract that such mortgage should be given when the creditor asked for it, is not a preference, under the provisions of the Bankrupt Act, although made within four months before the commencement of bankrupt proceedings.—*Hewitt v. Northrup*, Sup. Ct. N. Y., N. B. R., July 15, p. 27.

— *Proof of debt—Is a proceeding in rem.*—When the bankrupt is dead, a creditor offering himself as a witness to prove his claim cannot be excluded on the ground of interest; The proof of debt against an estate in bankruptcy is a proceeding *in rem*, and not a proceeding against a bankrupt, nor against his executors or administrators in case of his death.—*In re E. C. Merrill*, U. S. Dis. Ct., D. Vt., N. B. R., July 15, p. 35.

— *Proof of debt—How taken in a foreign country.*—Proof of debt can only be taken in a foreign country before one of the officers authorized by sec. 5079 of the Rev. Stat. to do so.—*In re Lynch et al.*, U. S. Dis. Ct., S. D. N. Y., N. B. R., July 15, p. 35.

— *Sale of real estate by assignee.*—Where the assignee has sold real estate discharged of liens, he should allow interest on the liens to the date of making up his report of distribution; Attorney's commissions and costs,

BANKRUPTCY—Continued.

stipulated to be paid on foreclosure, are not allowable when the proceedings to foreclose are invalid; When the bankrupt court has first taken jurisdiction by ordering a sale of mortgaged premises discharged of liens, it thereby ousts a state court of jurisdiction to foreclose the mortgage.—*In re Devor* U. S. Dis. Ct., W. D. Pa., N. B. R., Aug. 1, p. 56.

— *Set-off—Will not be allowed, when.*—A court of equity will not aid a debtor to a bankrupt's estate to set off debts bought upon a speculation; the probable dividends against the debt he owes the estate; Knowledge that a merchant has suspended payment generally includes a constructive knowledge of each particular suspension; A creditor who receives a composition from his bankrupt debtor, with full knowledge of all facts, is not entitled afterwards to require a set-off to be enforced by a court of equity, which had opportunity to assert at the time the composition was made; The courts of law, in Massachusetts, have authority to adjust credits.—*Hunt v. Holmes* U. S. Dis. Ct., D. Mass., N. B. R., Aug. 15, p. 101.

BILLS AND NOTES.—Promissory note; One who is both maker and endorser liable as maker; Signing as executor will not limit personal liability.—*Aughinbaugh v. Roberts*, Sup. Ct. Pa., W. N. C., July 12, p. 181.

— Negotiable paper; An endorser of a promissory note is competent witness to prove an agreement in writing, at the time of endorsement, that he should not be bound; Such agreement is equivalent to an endorsement without recourse, and is good between the parties; Estoppel: Judgment: only estoppel, in another suit upon a different demand, as to matters actually put in issue or determined.—*Davis v. Brown*, Sup. Ct. U. S., C. L. N., July 21, p. 361; *s. c.*, Am. L. Reg., Aug., p. 476.

— Promissory note; Alteration of; Evidence; Offer to prove consent of one of several makers to alteration of note; When admissible; Process *Alias* and *pluries* summonses; Irregular proceedings by; Act of 1830; Practice.—*Myers v. Nell et al.*, Sup. Ct. Pa., W. N. C., Aug. 9, p. 229.

— The insertion in a promissory note, payable to order, of the words "a five per cent. collection fee if not paid when due," destroys the negotiability of a note, and the endorser is not liable on it as such.—*Woods North et al.*, Sup. Ct. Pa., W. N. C., Aug. 16, p. 241; *s. c.*, Alb. L. J., Aug. 18, p. 116.

— A note is not non-negotiable by the addition of a stipulation therein to pay costs of collecting and reasonable attorney's fees; Protest and service of notice thereof; Dishonored paper; To whom holder of may give notice; Pleadings; Suit by an assignee in bankruptcy in a state court.—*Scott v. Scoville*, Sup. Ct. Kas., C. L. J., Aug. 24, p. 184; *s. c.*, Alb. L. J., Sept. 1, p. 148.

BONDS, MUNICIPAL.—Where a town votes to issue bonds in aid of a railroad under certain conditions, held that, if there has been a substantial compliance with the conditions, the law will compel the bonds to issue, though where there is a lack of performance to the extent of one-fifth in amount and value of the conditions, it cannot be considered a substantial compliance.—*Illinois, etc., R. R. Co. v. Supervisors*, Sup. Ct. Ill., C. L. N., July 21, p. 364.

— Subscription by town to capital stock of railroad; Unauthorized; Legalizing vote by act of legislature. *Barnes v. Town of Lacon*, Sup. Ct. Ill., C. L. N., Aug. 4, p. 378.

— Held, it is the duty of the board of liquidation to refuse to fund the bonds until they have been declared legal and valid obligations by the supreme court of the state, by a final decree of that court. Held that, where the decree of the court restricted its opinion as follows: "By formal expression

MUNICIPAL—Continued.

to be distinctly understood that we are expressing no opinion as to the validity of any bonds except those before us and in the hands of the court; it is not a final decree of the court as to other bonds of the same kind not before the court. *State v. Board of Liquidation*, Sup. Ct. La., Aug. 18, p. 896.

LEGAL.—A court of chancery will not assume jurisdiction to reform a bond that is defective and not binding upon the principal or sureties of Schools, etc., *v. Otis et al.*, Sup. Ct. Ill., C. L. J., Aug.

LAWS.—Where a foreign corporation loans money to an inhabitant of Oregon through the intervention of an agent resident in Oregon, with the approval of the corporation at its home office, the contract of loan made in Oregon, and, unless such corporation had complied at the time with the laws of Oregon concerning foreign corporations doing business in this state, is void; Where the notes given for such loan are made payable to the corporation at its office in Scotland, so far as the performance of the contract is concerned, including the rate and payment of interest, its validity is not affected by the fact that a mortgage was given on real property in Oregon to secure the payment of said notes.—*The Or. Wash. T. Lathburn*, U. S. Cir. Ct., D. Oreg., C. L. N., Aug. 4, p. 877.

MUNICIPAL LAW.—The act of May 21, 1874 (P. L. 220), authorizing the board of a municipal hospital to make requisitions upon the county treasury for the payment of a sum of money for the support of certain patients, is unconstitutional, as contrary to art. 9, sec. 7, of the constitution (Sharswood and Paxson, JJ., dissent).—*Wilkesbarre City Hospital v. Luzerne*, Sup. Ct. Pa., W. N. C., July 12, p. 178.

COMMERCE.—Action of Congress on the subject is exclusive of state authority, but, in the absence of such action, a state law not repugnant to commerce is not unconstitutional, because it indirectly affects commerce; A state law giving a remedy where death is caused by a collision on navigable waters within the jurisdiction of the state; The act of Congress of 1850, regulating pilots, etc., to change the relations of the pilots, etc., and the ship-owners as masters and servants.—*Sherlock v. Alling* (with note), Sup. Ct. U. S., Am. L. Rep., p. 455.

CRIMINAL.—The act of Congress of 1866 (U. S. Rev. Stat., sec. 643), providing for the removal of criminal proceedings against a United States revenue officer, the offence complained of is alleged to have been committed under color of his office, is constitutional.—*State v. Hoskins*, Sup. Ct. N. C., Alb. L. J., p. 83; *s. c.*, West. Jur., Sept., p. 535.

TRUSTS.—The late riots; Interference with property in the custody of the court, treated as a contempt; Property held in trust by this court, for the purpose of its protection while being foreclosed, is in the possession of the court, like public property, and the court can allow no interference therewith from any foreign source, and will treat and punish such interference as a contempt. *Secor et al. v. Toledo, etc., Ry. Co.*, U. S. Cir. Ct., Ill., C. L. N., Aug. 18, p. 893.

TRUSTS.—The late riots; Interference with property in custody of the U. S. court; A receiver is an officer of the court, whose duty it is to protect the property and operate the roads under the direction and order of the court; the property thus placed in his possession is considered as properly committed to the court, and, of course, entitled to its protection by all the laws which are at the disposal of the court, and the court, being a national court, has a right to call upon the nation, as such, to enforce its orders; In such cases as for a contempt of court, for interfering with railroads in the

CONTEMPT—Continued.

hands of a receiver, the court proceeds in a summary manner, and the accused is not, of right, entitled to a trial by jury; The court will not proceed summarily to punish an offender except where the offence is clearly proved; The court discusses, at length, the question of the rights of labor.—*King v. Ry. Cos.*, U. S. Cir. Ct., D. Ind., C. L. N., Aug. 25, p. 401.

— The late riots; Defendants, previously found guilty of interfering with property in the possession of a receiver appointed by the court, and sentenced to undergo a penalty, are released from imprisonment upon promises of good behavior, and upon entering into recognizances to observe the laws of the United States, and to abstain from all wrongful interference with any property in the possession of a receiver of the court.—*Secor et al.*, v. Toledo, etc., Ry. Co., U. S. Cir. Ct., S. D. Ill., C. L. N., Sept. 1, p. 409.

CONTRACTS.—Statute of frauds; Payment of debt by note of third person with oral guarantee of the note by the debtor; Such guarantee is within the statute, and therefore void.—*Dows v. Swett* (with note), Sup. Jud. Ct. Mass., Am. L. Reg., Aug., p. 471.

— Chose in action; Mere possibility, such as wages which may be earned in a future employment, is not assignable; But, if there is an existing contract, even though it is for piece-work, and not for any definite time, the wages to be earned under it are assignable.—*Kane v. Clough*, Sup. Ct. Mich., Am. L. Reg., Aug., p. 482.

— An agreement for services made during life-time of a person, to be paid for after his decease, upheld and enforced. *Cottrell's Appeal*, Sup. Ct. Pa., W. N. C., Aug. 9, p. 237.

— Statute of frauds; Parol promise to pay the debt of another; Liabilities of endorsers; The holder of a promissory note sued the second endorser, who paid the note before judgment; In a subsequent action by the second against the first endorser, defendant offered to prove by parol that plaintiff was, in fact, surety for the maker of the note, and that he placed his name on the back of the note by mistake; *Held*, that the evidence was not admissible. *Per Paxson, J.* It makes no difference, as regards the effect of the statute of frauds, whether the party invoking it be plaintiff or defendant.—*Hauer & McNair v. Patterson*, Sup. Ct. Pa., W. N. C., Aug. 30, p. 270.

— Contract made in disregard of a statutory requirement is generally void, but not necessarily so; Where it appears to have been the legislative intent not to make the contract void, but that some other prescribed result should be the only penalty, the courts will sustain the contract; Foreign corporation; Requirement that before doing business they shall appoint an agent upon whom service may be made in the state court; Contract made before appointment of such agent may be validated by subsequent appointment before suit.—*Wood Machine Co. v. Caldwell* (with note), Sup. Ct. Ind., Am. L. Reg., Sept., p. 554.

COPYRIGHT.—Labels deposited under act of June, 1874; Publication before copyright; Act of Congress of June 18, 1874, is to be regarded as an amendment to the copyright laws; To acquire a copyright in any print or label deposited in the patent office, it is essential that the title of the print or label be first deposited in pursuance of the provisions of the Revised Statutes concerning copyrights.—*Marsh v. Warren*, U. S. Cir. Ct., S. D. N. Y., C. L. N., Aug. 18, p. 395.

CORPORATIONS.—Voluntary subscriptions; Gratuitous subscription to promote the objects of a corporation or joint undertaking cannot be enforced upon the promisee, unless in reliance upon it he has done something, or assumed some obligation; The fact that others have subscribed to the same object is not a sufficient consideration.—*College Street Church v. Kendall* (with note), Sup. Jud. Ct. Mass., Am. L. Reg., Sept., p. 548.

—Authority of public agent to bind county; Authority of public agents distinguished; Property of county not subject to mechanic's lien.—*Bouton v. Supervisors*, Sup. Ct. Ill., C. L. J., Aug. 3, p. 105.

Removal of cause from state to federal court; Injunction by state against proceeding in United States court; When such injunction has territorial operation.—*Lehigh, etc., Co. v. Central R. R. Co., etc.*, U. S. Cir. Ct., W. D. Pa., W. N. C., July 12, p. 187.

Removal of cause from state to federal court; *Held*, in the removal of a cause from a state to a federal court, the whole suit must be removed; a part of a suit cannot come to the federal court for trial, because a party joined in that fragment, or some single issue, is a citizen of another state than that of the plaintiff; *Held*, that it is not enough that citizens of different states must be interested in the same issue or controversy which is the subject-matter of a case, but they must have such an interest that, when the case is settled, the suit is thereby determined; the right of removal is not given.—*Carraher v. Brennan*, U. S. Cir. Ct., D. Ill., C. L. N., July 21, p. 363.

Removal of cause from state to federal court; Under the act of March 3, 1875, the right to remove a cause from a state court to the United States circuit court exists in all cases where there are substantial parties, citizens of different states, on opposite sides of the cause, although there are parties on the same side who are citizens of the same state; The act of July 27, 1870 (Stat. 306), so far as it authorizes a defendant to remove a cause as a matter of course, is not repealed by the act of March 3, 1875.—*Girardey v. Moore et al.*, U. S. Cir. Ct., S. D. Ga., C. L. J., July 27, p. 78.

Removal of cause from state to federal court; Removal of cause; Parties in a cause; *Held*, that where there are merely formal parties defendant to the cause, and against whom no relief is asked or decreed, and who are residing in the same state with complainants, that does not oust the federal court of its jurisdiction of a cause if it appear that the parties really are citizens of different states.—*Board, etc., of Arapahoe County v. Pacific Ry. Co. et al.*, U. S. Cir. Ct., D. Col., C. L. N., July 28, 1875, C. L. J., Aug. 3, p. 102.

Removal of cause from state to federal court; Removal of cause; Parties in a cause; *Held*, that where there are merely formal parties defendant to the cause, and against whom no relief is asked or decreed, and who are residing in the same state with complainants, that does not oust the federal court of its jurisdiction of a cause if it appear that the parties really are citizens of different states.—*Board, etc., of Arapahoe County v. Pacific Ry. Co. et al.*, U. S. Cir. Ct., D. Col., C. L. N., July 28, 1875, C. L. J., Aug. 3, p. 102.

Courts have exclusive jurisdiction over territory occupied for military purposes, unless it has been purchased pursuant to provisions of Art. 1, Sec. 10, Const. U. S. Military courts are judicial tribunals, and emanate from the same source as the civil federal courts; They have exclusive jurisdiction over cases of a purely military nature; When a soldier by the commission of a crime against the civil and military authorities, he is to be tried by the court-martial and by the civil tribunal, and a trial by one is no bar to subsequent proceedings by the other; Officers and soldiers are citizens, and are just as amenable to the civil tribunals as other citizens; Military law is superseded by, and subordinate to, civil law; When a soldier or soldier, in time of peace, by the same act commits a crime against the military and civil authorities, at any time prior to being put on trial by the military court, he must be given up to the civil authorities, and a writ of habeas corpus duly made by or in behalf of the party injured, pursuant to provisions of Art. War, 59, Rev. Stat. U. S., p. 234; Unless such demand for a writ of habeas corpus is made, the military authorities will retain custody of the soldier and jurisdiction of the case till it is disposed of, after which he will be amenable to the civil courts.—*State of Nebraska v. Pollock*, Dis. Ct. Neb., C. L. N., Sept. 1, p. 412.

Law.—Murder in the first degree; Evidence necessary to convict; Possession of a deadly weapon; Presumption of intent to kill; Absence of motive; Effect of in strengthening evidence of degree of murder.—*Lanahan v. Commonwealth*, Sup. Ct. Pa., W. N. C., July 19, p. 194.

Intoxicating liquors.—Sufficient, in an information for selling intoxicating liquors, to define them by the general term, "intoxicating liquors;" It is not necessary to specify whether the same was whiskey, gin, brandy, rum, or other spirits.—*State v. Hannum*, Sup. Ct. Ind., West. Jur., Aug., p. 478.

CRIMINAL LAW—Continued.

— Rape; Assault with intent; Evidence; On the trial of an indictment for an assault with intent to commit rape it is competent, where the defendant is a witness, to enquire of him what his intention was.—*Greer v. State*, Sup. Ct. Ind., West. Jur., Aug., p. 480.

— Witness; Party; Credibility; On the trial of an indictment the defendant testified in his own behalf as a witness, and the court instructed the jury that " * * * one interested will not usually be as honest and candid as one not so;" *Held*, error, and that, even if the proposition be true as matter of fact, it is not a legal presumption.—*Greer v. State*, Sup. Ct. Ind., West. Jur., Aug., p. 480.

— Where, under statute, defendant testifies, state's attorney has the same right to comment upon his testimony as in the case of other witnesses; Murder; Justification; Belief.—*State v. Harrington*, Sup. Ct. Nev., C. L. J., Aug. 17, p. 154.

— Requisites of indictment for uttering forged paper under Missouri statute.—*Watson v. State* (with note), Sup. Ct. Mo., C. L. J., Aug. 31, p. 210.

DAMAGES.—Measure of damages; Diversion of water of stream; Evidence; Testimony of expert; Public assessors; Assessments as evidence of value; Declaration of agent, when binding on principal.—*Hanover Water Co. v. Ashland Iron Co.*, Sup. Ct. Pa., W. N. C., Aug. 28, p. 256.

— Defective coal shaft; Action under Illinois statute.—*Wesley City Coal Co. v. Haler*, Sup. Ct. Ill., C. L. J., Aug. 24, p. 180.

DEVISE.—Legacies and annuities; When chargeable upon land; Devise to charitable uses; When void; When subject of such devise descends upon heirs subject to charges; Appeal in proceeding under the act of February 23, 1853 (Purd. Dig. 451); When entertained.—*Davis' Appeal*, *Hanbest's Estate*, Sup. Ct. Pa., W. N. C., Aug. 30, p. 207.

EJECTMENT.—Evidence; Abstract of title, possession of; What court will take judicial notice.—*Smith v. Stephens*, Sup. Ct. Ill., C. L. N., July 21, p. 363.

— Title; Practice; Confederate states; Conquest; Executors and administrators; Estoppel; Nonsuit.—*Atkinson v. Central Georgia, etc., Co.*, Sup. Ct. Ga., C. L. N., Sept. 8, p. 419.

EVIDENCE.—Act of April 15, 1869; Incompetency of party as a witness in action against surviving member of a firm.—*Standbridge v. Catanach*, Sup. Ct. Pa., W. N. C., July 12, p. 176.

— *Held*, error to permit one joint tort-feasor to testify that he alone was responsible for the injury done; the law regarding no distinction as to liability in such cases, and such testimony having the effect of solving a question of law of which the witness had no right to speak.—*Hoener v. Koch et al.*, Sup. Ct. Ill., C. L. N., July 28, p. 371.

EXECUTORS AND ADMINISTRATORS.—Decedent's estate; Administrator; Interest accruing after the filing of the account belongs to distributees; Administrator chargeable therewith.—*Estate of Wm. Pollock, deceased*, *Large's Appeal*, Sup. Ct. Pa., W. N. C., July 12, p. 182.

— Decedents' estates; Orphans' court; Sale of real estate for payment of debt secured by first mortgage; *Scire facias* on such mortgage in the common pleas; When not stayed; Practice in Philadelphia county.—*Grice's Appeal*, Sup. Ct. Pa., W. N. C., July 26, p. 208.

— Marshailling of testator's assets; Legacies; General and specific; Devises of real estate; Specific devises; Reference purchasers.—*Farnum v. Bascom*, Sup. Jud. Ct. Mass., C. L. J., Aug. 31, p. 204.

EXPRESS COMPANY.—Plaintiff delivered three bales of furs, worth \$7,000, to the defendants at Chicago, for transportation to New York, taking a receipt therefor, in which it was stipulated that the company should not be held for any loss or damage except as forwarders only, nor for any loss or damage

EXPRESS COMPANY—Continued.

box, package, or thing, for over \$50, unless the just and true value of should be stated in the receipt. No value was stated in the receipt. The furs were lost through the failure of a railroad company, employed by the plaintiff to carry them, to provide its cars with the most approved platform in use. *Held* (1), that, while the defendant could, by express contract, relieve itself of its liability as an insurer, it could not so relieve itself of its liability for its own negligence, or that of a railroad company employed to carry its freight; (2) that the railroad company in question was guilty of negligence in not adopting and using the most approved platform in use, and that defendant was liable for the value of the furs lost on account of such default; (3) that to avail itself of the limitation upon its liability, contained in said receipt, to any extent, the defendant must show, by the most satisfactory evidence, that the terms of the receipt were comprehended and assented to by the shipper.—*Boskowitz v. Express Co.* (with note), Sup. Ct. Ill., C. L. J., July 20, p. 58.

FRUITFUL CONVEYANCES.—Voluntary conveyance; Title; A voluntary conveyance of property, made for the purpose of defrauding the creditors of the grantor, will pass the title to the grantee, and the property will be subject to be levied or sold as the property of the latter, at the suit of his creditors; Representatives and privies; Though the conveyance be subject to disavowance for fraud, at the suit of the creditors of the grantor, it cannot be impeached by the representatives, heirs, or devisees of the grantor, or by a person claiming under him; Sheriff's deed; Recitals in a sheriff's deed conclusive as against third parties.—*Fowlkes v. Harris* (with note), Sup. Ct. Pa., C. L. J., Aug. 24, p. 181.

ATTACHMENT.—An attachment execution, where an issue is framed upon a *res nullius bona*, a verdict which simply gives a sum of money to the plaintiff is erroneous; The verdict should show what goods or property of the defendant are in the hands of the garnishee.—*Bonaffon v. Thompson*, Ct. Pa., W. N. C., July 26, p. 210.

WIDOW AND WIFE.—*Feme covert*; Contract with, survives to her; When a limitation operates only on the remedy it must be pleaded; Oral defence not admissible; When the statute does not bar debt for money owed from trustee.—*Merriman v. Cannovan*, Sup. Ct. Tenn., C. L. N., July 1, p. 412.

MINOR.—H., a minor, was a partner of a firm which made certain checks in payment of goods purchased by it; H. remained a partner seven weeks after he reached age (during which time the firm retained the goods), and drew money for his own use from the firm; The firm was then dissolved; H. had an agreement from the other members that they would pay its debts; It was supposed the checks had been paid; *Held*, that H., being an infant when the checks were made, was not liable thereon, and his acts subsequent to reaching age did not constitute a ratification.—*Tobey v. Wood*, Sup. Ct. Mass., C. L. J., Aug. 10, p. 125; *s. c.*, Alb. L. J., Aug. 25, p. 186; Ct. L. N., Sept. 1, p. 410.

INJUNCTION.—Whether it will lie by city against its own officers to prevent collection of state tax; Taxation; Power of state board of revenue commissioners to add to subjects of; *Held* (an equally divided court affirming the result below), that an injunction will not issue at the suit of a city against its own officers, the state being no party to the bill.—*City of Philadelphia v. Board of Commissioners* *et al.*, Sup. Ct. Pa., W. N. C., Aug. 2, p. 222.

WARRANT, FIRE.—Legal representatives; Descent; Alienation; Judicial Construction; Ambiguity; Waiver of Conditions; Estoppel; Need of writing; What will amount to a waiver; New consideration; Power of attorney; Incidental powers; Extent of waiver; Court and jury.—*Georgia Ins. Co. v. Kinnier's Admr.* (with note), Sup. Ct. App. Va., C. L. J., July 10, p. 127.

INSURANCE, FIRE—*Continued.*

— Waiver of conditions of policy; Condition that waiver must be endorsed on the policy; Effect of parol waiver; Principal and agent; Agent's knowledge; How far principal affected; Pleading; Variance between narrative and evidence. *The State Ins. Co. of Missouri v. Todd et al.*, Same v. J. C. Todd, Sup. Ct. Pa., W. N. C., Aug. 16, p. 248.

INSURANCE, LIFE.—Life insurance; Suicide; When intent to commit is question for jury; Where no eye-witness to a death by violence exists, the question of whether or not the deceased has committed suicide is to be submitted to the jury for determination from the surrounding circumstances; *Held*, that under the circumstances the question of whether or not the deceased had committed suicide was properly left to the jury.—*Shank v. United, etc., Society*, Sup. Ct. Pa., W. N. C., Aug. 2, p. 222.

— Failure to pay premiums on account of intervention of war; Insured entitled to equitable value of policy if he die during the war.—*Crawford v. Etna Life Ins. Co.*, Same v. *Manhattan Life Ins. Co.* (with note), Sup. Ct. Tenn., C. L. J., Aug. 3, p. 100.

— Evidence; Circular; Non-forfeiting policy; In an action upon a policy of life insurance, evidence of the wholesale issuance, by the defendant, of a circular apprising its policy-holders that its policies are to be made non-forfeiting, so far as the "premium reserve" will make them so, is held admissible in evidence as tending to show that the insured failed to pay his last premium by reason of reliance upon the promises of such circular, and, if the jury find the fact to be so, the policy is not to be forfeited during such period as the "premium reserve" will cover.—*Steel v. St. Louis, etc., Ins. Co.* (with note), St. Louis Ct. App., C. L. J., Aug. 17, p. 168.

JUDGMENTS.—Former judgment; When a bar; Extrinsic evidence to show point contested in former trial.—*Russell v. Place*, Sup. Ct. U. S., C. L. N., July 21, p. 361.

— When a lien; Entry upon docket; The law of the state where entered followed in federal court; In order to operate as a lien the judgment must be properly and not ambiguously entered.—*In re Hamilton Boyd*, U. S. Dis. Ct., D. Oreg., C. L. N., Aug. 11, p. 385.

— Foreign judgment; Where it embraces the same subject-matter it is conclusive, although the suit in which it was obtained was begun after the one in which it is pleaded; *Plea puis darrein continuance*; Receiver; Presumption of identity with his company as a party to a suit.—*Paine v. Schenectady Ins. Co.*, Sup. Ct. R. I., Am. L. Reg., Sept., p. 564.

JUDICIAL SALES.—Will not be set aside for inadequacy of price, when; Redemption; Sale in gross; Subdivision.—*Jones v. Townsend* (with note), Sup. Ct. Tenn., C. L. J., Aug. 31, p. 202.

LANDLORD AND TENANT.—Tenant holding over; Verbal lease for a year to commence *in futuro*.—*Held*, that if a tenant, under a lease for a year, hold over, he holds the premises, in the absence of a new agreement, subject to the same terms and conditions as in the original lease; That the holding over rests upon a new implied contract, and not upon the former lease; *Held*, that a verbal lease for the period of one year, to commence *in futuro*, is valid, and not within the statute of frauds of Colorado.—*Lears v. Smith et al.*, Sup. Ct. Col., C. L. N., Aug. 11, p. 386.

LIMITATIONS OF ACTIONS.—A suit upon a mortgage is not a suit for the determination of any right to, or interest in, real property, but simply a suit upon a sealed instrument to enforce a lien for the payment of the debt which it is given to secure, and is, therefore, barred within ten years from the time the cause of suit accrues; Absence of the mortgagor from the state, when or after the cause of suit accrues upon a mortgage, does not suspend or prevent the statute of limitations from running against a suit to foreclose the same.—*Eubanks v. Leveridge*, U. S. Cir. Ct., D. Oreg., C. L. N., Aug. 18, p. 394.

LIMITATIONS OF ACTIONS—Continued.

— **Trusts; Fraud; Photographic copies of instruments sued on can only be used as secondary evidence.**—*Eborn v. Zimpleman*, Sup. Ct. Tex., C. L. J., Aug. 31, p. 207.

— There is no statutory bar in Virginia to the time within which a petition may be filed to correct error in an interlocutory decree; Decree of sale of lands; Liens.—*Kendrick v. Whitney*, Sup. Ct. App. Va., C. L. N., Sept. 8, p. 419.

LIQUOR SELLING.—Exemplary damages for mental distress, in action under "civil damage" laws; Evidence; Former intemperate habits.—*Friend v. Dunks* (with note), Sup. Ct. Mich., C. L. J., Aug. 17, p. 161.

MANDAMUS.—Construction of statute; State auditor; The act of the sixteenth general assembly, "appropriating money for the aid and maintenance of the state university," which authorizes the payment of the amount "in eight equal quarterly instalments, commencing on and with the first day of July, 1875, or as soon after such quarterly periods as the money in the state treasury may allow," casts upon the state auditor the duty to issue warrants for each quarterly instalment at the beginning of each quarter, although there is no money in the state treasury to pay the same, and *mandamus* will issue, in case he refuses, to compel the auditor to perform such duty.—*State v. Sherman*, Sup. Ct. Iowa, West. Jur., Sept., p. 526.

MASTER AND SERVANT.—Negligence of co-employé causing injury to servant; Evidence of incompetency of co-employé; Previous discharge; Custom must be shown to be general; Opinion of superintendent as to competency of an employé; Specific acts of negligence of employé, when admissible.—*Couch v. Watson Coal Co.* (with note), Sup. Ct. Iowa, C. L. J., Aug. 3, p. 106.

MORTGAGES.—Mortgage to secure coupon bonds; Sheriff's sale; Distribution of proceeds; Holder of bond informally transferred to him.—*Hodge's Appeal*, Sup. Ct. Pa., W. N. C., Aug. 23, p. 259.

— A mortgagor sold the mortgaged property to W., who assumed the payment of the mortgage; When the mortgage became due the property could be sold for sufficient to satisfy it, and he requested the mortgagee to immediately foreclose it; The mortgagee neglected to do so, and the property depreciated in value so that there was a deficiency on foreclosure sale when made; *Held*, that the mortgagor was not liable for the deficiency.—*Russell v. Weinberg*, City Ct. Brooklyn, Alb. L. J., Sept. 8, p. 164.

MUNICIPAL CORPORATIONS.—Contracts with municipal corporations; Authority of municipal officers to make time contracts.—*Garrison v. City of Chicago*, U. S. Cir. Ct., N. D. Ill., C. L. N., July 21, p. 362.

— Damages for negligence cannot be recovered against a municipal corporation for an injury resulting from the *plan* of a public work, as distinguished from its mode of execution; So *held* where the injured party had fallen into a ditch which was dug across a highway, but was not covered to the full width of the road; The determination of the plan of a public road is in the nature of legislative action, the lawful exercise of which can neither be a wrong nor be transferred to courts and juries from the body to which it belongs; Negligence may be predicated of the construction and subsequent management of a public work, but not of its plan.—*City of Lansing v. Toolan*, Sup. Ct. Mich., Alb. L. J., Sept. 8, p. 164.

NATIONAL BANKS.—The cashier of a national bank, with the knowledge of the directors, received bonds for safe keeping from a customer, and gave a receipt for them; The bonds were subsequently stolen; No explanation of the robbery being offered, *held*, that there was in this case sufficient evidence on the question of gross negligence to go to a jury; *held*, further, that, if the bonds were stolen through gross negligence on the part of the bank, the latter was liable.—*First National Bank, etc., v. Graham*, Sup. Ct. Pa., W. N. C., July 28, p. 205.

NATIONAL BANKS—Continued.

— A resolution to go into liquidation, together with a certificate of discharge from liability for circulating notes, does not operate to dissolve a national bank so that no judgment can be rendered against it; A state court may entertain an action of debt against a national bank to recover double the amount of interest unlawfully taken by it; There is a distinction between a remedial penalty given the party aggrieved and a penalty prescribed as a criminal punishment, and a state court may entertain an action to recover the former, although it is given by an act of Congress; The penalties and forfeitures, of which exclusive jurisdiction is given to the federal courts by section 711 of the Revised Statutes, contemplates only those penalties and forfeitures of a public nature which may be sued for by the government, or some person in its behalf.—*Ordway v. Central National Bank* (with note, Ct. App. Md., C. L. J., July 27, p. 84.

NEGLIGENCE.—A railroad company is not liable for an injury to a person resulting from its failure to exercise ordinary skill and care in the erection or maintenance of its station-house, where, at the time of receiving the injury, such person was at such station-house by mere permission and sufferance, and not for the purpose of transacting any business with the company or its agents, or on any business connected with the operation of the road.—*Pittsburg, etc., R. R. Co. v. Bingham*, Sup. Ct. Ohio, C. L. J., July 27, p. 82.

— Demurrer to evidence; Review by supreme court; Contract; Release of damages for injury by negligence; If signed while releasor is incapacitated in mind, through the influence of opiates taken to lull pain after an accident, it is void; In such case the releasor may sue for the tort without tendering back the amount received; Negligence of fellow-servant; Notice to employer of servant's character.—*Chicago, etc., R. R. Co. v. Doyle*, Sup. Ct. Kas., Am. L. Reg., Aug., p. 484.

— Contributory negligence defined.—*Harlan v. St. Louis, etc., Ry. Co.*, Sup. Ct. Mo., C. L. J., Sept. 7, p. 221.

OFFICERS.—Where the office is abolished, the officer not only becomes *functus officio*, but he has no right to further compensation unless there has been an express contract for a specified time; An election to office for a certain term is not such a contract.—*Williams v. City of Newport*, Ct. App. Ky., Am. L. Reg., Sept., p. 567.

PARTNERSHIP.—Where one who has given credit to a partnership which he believes to be a limited partnership, and which is known to the public as such, afterwards seeks to charge all the partners as general partners, the burden of proof is upon him to show a general partnership.—*Whilldin v. Bullock*, Sup. Ct. Pa., W. N. C., Aug. 9, p. 284.

PATENTS.—Infringement; Held, that a mere suggestion that a given result can be obtained is not patentable, and does not anticipate a patent by another, but a mechanism or design must be described by which the suggested result is obtained.—*Graham v. Gammon*, U. S. Cir. Ct., N. D. Ill., C. L. N., July 28, p. 370.

PLEADING.—Denial of citizenship of the plaintiff pleaded with matter to the merits becomes frivolous; Ambiguity or uncertainty not a ground for motion to strike out; A plea of estoppel which does not show that the defendant was misled by the plaintiff, or those under whom he claims, is frivolous.—*Gager v. Harrison*, U. S. Cir. Ct., D. Oreg., C. L. N., Aug. 4, p. 377.

— A declaration counting upon a promise good in parol, by the common law, need not show a compliance with the statute of frauds; Held, that a stranger to the consideration cannot enforce a contract by an action therein in his own name.—*Lehow v. Pierce*, Sup. Ct. Col., C. L. N., Aug. 23, p. 408.

POWERS.—Trust; Power of distribution; Does not include power of limitation as to character of estate given; Trust created under such power void.—*James M. Smith's Estate*, Appeal of the Fidelity, etc., Co., Sup. Ct. Pa., W. N. C., Aug. 30, p. 265.

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I. PRINCIPLES OF NATURAL JURISPRUDENCE.

Jurisprudence is the science of what is right and what wrong:¹ it is the science of law—law itself being that which determines what is right and what wrong.²

Law, thus understood, is principally of three kinds—namely, natural, positive, and international: natural, as a criterion of right and wrong which reason prescribes to all mankind;³ positive, civil or municipal, as a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong;⁴ international, as a rule of right and wrong acknowledged among nations for the regulation of their mutual intercourse.⁵

Of these, separately and in their order. And, first, of natural law, the science of which is natural jurisprudence.

Natural jurisprudence, then, we define to be the science of the duties enjoined and of the rights conferred by the nature of man. For the nature of man is the primary law of his being—a law which exists in a threefold relation: a

¹ *Jurisprudentia est divinarum atque humanarum rerum notitia, justique injusti scientia.* Inst. I, I, I. See Austin on Jurisprudence, p. 223 (London, 1869).

² Justice is the daughter of the law, for the law bringeth her forth.—Co. Litt. 142 a. "Law is itself the standard of justice."—Austin on Jurisprudence, p. 223.

³ See Inst. I, 2, I.

⁴ 1 Blackst. Com. 44. See Co. Litt. 319 b, and note (F) by Thomas.

⁵ See Montesquieu's Spirit of Laws, b. I, c. 3, and 1 Blackst. Com. 43.

relation to his Creator, a relation to the material world, and a relation to mankind; the first giving birth to religion, the second to the science of physical phenomena, and the third to history, philosophy, and jurisprudence. These three relations are, therefore, the primary and necessary laws of mankind. Laws, in their natural and most general signification, being, as Montesquieu says, the necessary relations arising from the nature of things. In which sense all beings have their laws—the Deity his laws, the material world its laws, the intelligences superior to man their laws, the beasts their laws, man his laws.⁶

⁶ Spirit of Laws, b. 1, c. 1. Commenting on Montesquieu's doctrine, that "laws are the necessary relations which flow from the nature of things." Austin asks: "What, I would crave, are relations? What, I would also crave, is the nature of things? And how do the necessary relations which flow from the nature of things differ from those relations which originate in other sources? The terms of the definition are incomparably more obscure than the term which it affects to expound." Austin on Jurisprudence, p. 217. Lond. ed., 1869. Austin would not allow the term law to be applied to anything other than a positive command. But it was necessary for Montesquieu (as it is for us), in attempting to unveil the fundamental and controlling principles of positive laws, that the term law should be rescued from that narrow and limited meaning which restricts it to mere verbal commands and prohibitions. Perhaps there is not in our language a synonym for the word relation. But its meanings, comprehensive and various, are not obscure. The same observations apply to the word nature. But I conceive that men will never be persuaded to abandon these or the like expressions, unless a better reason shall be given than that they cannot define them by precise and exact equivalents. In defiance of logicians, men will do as they have done—they will distinguish between things natural and unnatural by using these very terms, and for this very reason—that they have no exact equivalents. I do not know that it can be scientifically demonstrated that any object of thought has its nature, or that the nature of an object differs from the object itself. But all of us do know that the distinction between an object and the nature of that object is fundamental to human thought. Nature is the ground (ideal or real) on which the subject-perceiving meets and knows the object perceived. The mind has its nature—a ground whereon it may perceive and know itself: in its reflective thought it reflects nature, and thus reproduces the *tertium quid* as the possibility of synthetic thought. Sir William Hamilton maintained (in his Philosophy of the Conditioned) that all our knowledge is only a knowledge of relations; that we can know a thing only in its relations, and can know nothing in itself. Yet I doubt not that men will generally hold that they know things, natural and unnatural and also know the nature of things. But why this jargon? The all

The relation of God to man, though the natural foundation of religious faith, the subject of divine revelation, and the source of all that is truly sublime in the history of man, is

comprehensive ideas of the mind must have their corresponding expressions. Define these expressions, assign to them logically definite and exact meanings, and you annihilate their true import. The word God is expressive of an all-comprehensive idea of the mind. Define it as derived from good, and good as importing merely something not evil, and the truth of the idea is turned into a lie. Logic drives us to definition; definition, to nihilism. In short, the process of definition is a process of exchanging the undefinable for the definable—the all-comprehensive, and, therefore, logically obscure, for the sum total of the particulars in which it is seen, and, therefore, logically transparent. The conclusion arrived at from the process is that there was nothing in the all-comprehensive but this totality of particulars; nothing in Being but what is manifest in its activity; nothing in the “I am” but what is seen in the “I do;” the substance is abandoned for the shadow, the soul for the body, and the truth for a lie. “*Omnis definitio in lege periculosa est.*” Even Austin himself confesses that “the elements of a science are precisely the parts of it which are explained least easily. Terms that are the largest—and, therefore, the simplest—of a series, are without equivalent expressions into which we can resolve them concisely. And when we endeavor to define them, or to translate them into terms which we suppose are better understood, we are forced upon awkward and tedious circumlocutions.” Austin on Jurisprudence, 90-91. It is not possible to avoid the necessity of intelligible definitions. But it should always be remembered that the method of definition is subordinate to that of philosophic comprehension and explanation. It may be proper (in looking for the solid foundations of our science) to observe that not even the giant mind of Fichte could escape nihilism in the philosophy of perception, because his method was rather a method of philosophic definition than one of philosophic explanation. The *ego* and *non-ego* were at once revealed in one and the self-same consciousness, or knowing capacity, which, comprehending both the *ego* and *non-ego* as given “in one and the same original and indivisible energy of intuition” (as Sir William Hamilton maintained), could not be found or placed in the *non-ego*, and could only be conceived or explained as an energy or power of the *ego* as Absolute Being. Yet this, however conceived or explained, must be confessedly the absolutely unknowable, being absolutely without and beyond the sphere of our consciousness and perception; while, on the other hand, the phenomenal world, being known only as appearing, and, by a method of philosophic definition, being wholly denuded of that intangible nature or principle of existence which, by our consciousness itself (and by nothing else), is posited as its ever-underlying, yet intangible, basis, becomes nothing but a picture, and this picture is found to be nothing but a dream; and even the dreamer himself, when truly comprehended, is found to be nothing outside of the dream—“not even the shadow of a dream.” This is possibly the logically necessary conclusion of Fichte’s wonderful *Wissenschaftslehre*.

not the immediate foundation of jurisprudence considered as a science, nor indeed of any science, as such. As founded in the relation of God to man, the theories and doctrines of natural law—presuming to blend the light of philosophy with the sacred mysteries of religious faith—exhibit but little, if anything, more than the pious efforts of learned antiquarians to perpetuate the epoch of theocratic government. Wherefore they reason, by reason, to prove the reasonableness of the revealed word of God, and the unreasonableness of reason! Thence a world of contradiction arises: religion and philosophy, church and state, piety and justice, things of a nature and purpose distinct, are confounded and mingled together, and entitled the law of nature, or natural law.⁷

⁷ Thus it is said: "The law of nature comprehends all the duties which we owe either to the Supreme Being, to ourselves, or to our neighbors—as reverence to God, self-defense, temperance, honor to our parents, benevolence to all, a strict adherence to our engagements, gratitude, and the like." *Bouv. Law Dict.* v. 2, p. 11—citing *Erskine's Pr. of L. of Scot.* b. 1, t. 1, s. 1; and referring to *Ayl. Pand.* tit. 2, p. 5; *Cicer. de Leg.* lib. 1. Hundreds of respectable authors may be quoted for a like confusion of things divine and things human. But they, I think, show not due reverence to God and religion who confound his law with the law of reason, and their duty to him with their duty to Cæsar. The relation of God to man is truly a natural law—the law of our existence, and also the law of religious belief; in virtue of which (we conceive) all men believe, and have ever believed, in the existence of God and his relation to man; and, as this is a natural belief of the human mind, we can no more doubt its truth than we can the truth of the mind itself; it is, indeed, the only natural and legitimate proof of that Self-existent Being. From a purely subjective (ego-istic) point of view, the force of this belief is somewhat reversed—the existence of the object being made to depend on the existence of the belief, and not the belief on the existence of the object. From the objective ground, we can never arrive at any such belief. And yet, our natural theology, ontology, or theodicea, in order to be of any avail in jurisprudence, must first be established to the entire satisfaction of all mankind—as clearly as the relation of man to man. Nor is this the only objection to founding jurisprudence in natural theology, and blending our duties to ourselves and to each other with our duties to God. The method of prescribing the law of our nature is not consistent with the true idea of a divine command. *Burlamaqui* says (in his *Principles of Natural Law*, Part ii. chapt. 4, § 5), and all the writers of nature's law substantially agree, that "the only way to attain to the science of natural law is to consider attentively the nature and constitution of man, the relations he has to the beings that surround him, and the states from thence resulting. In fact, the very term of natural law, and the notion

The relation of man to the material world involves no questions or considerations but those belonging to the science of physics—the science of the laws or relations of physical phenomena. Natural law, from this point of view, is nothing more than the natural order which man perceives in the relations and movements of physical bodies. And, therefore, here we have only to remark that man himself, as a physical being, is, like all other bodies, governed by invariable laws, which, as without his care or assistance, they benignly conserve the purpose of his being—the rational exertion of his will—so reason not only approves, but enjoins, a willing conformity to them.

we have given of it, show that the principles of this science must be taken from the nature and constitution of man." We accordingly enter upon the study of our nature. Our philosophy discovers a principle or rule by which, in our judgment, we ought to be governed. Thence we reason that God himself, being the author of our nature, is the author of that principle or rule, and has willed that all mankind should conform thereto—not attentively considering, after all, that the judgment we have formed is only our own judgment. Let us pursue our self-contradiction for a moment. We all substantially agree that "Reason is the first rule of man, the first principle of morality, and the immediate cause of all primitive obligation." *Ibid.* chapt. 7, § 13. Some, however, for Reason, say Understanding; others, Common Sense; others again, Moral Sense, or something else. Thus Reason, Common Sense, or whatever you will, is to be our supreme rule in matters of religion. The writer of natural law now writes his judgments, and calls them, sometimes, the laws or judgments of Reason, Common Sense, or something else human; at other times, to give them greater authority, he makes it out that the laws and judgments in question are the laws and judgments of God! This is one method. And many are the writers of natural law who, unconscious of the grossest impiety, pursue this self-contradictory method. Another, however, requires us to take as our guide the sacred scriptures—concerning, not only our duty to God, but also our duty to man in every relation. Now, the Christian religion is, I firmly believe, the only true guide for private conscience. But not one-fourth of the human race are of this persuasion. While nothing on earth, I as firmly believe, is so great an evil as theocratic rule: witness the religious persecutions and wars of which it is the parent. I shall, therefore differ in the method I pursue from all those authors who have held that religion should wed philosophy, and the church the state. "We ought not to decide by divine laws what should be decided by human laws; nor determine by human what should be determined by divine laws." For "these two sorts of laws differ in their original, in their object, and in their nature." Montesquieu, *Spirit of Laws*, b. 26, c. 2 and c. 9; b. 24, c. 1 and c. 3.

From the exclusive point of view assumed, and necessarily assumed, in the study and development of physical science, the inherent laws of the human mind, the invisibilities of the moral world—the only possible grounds of moral science, and, therefore, of jurisprudence—are either wholly obscured, or but dimly perceived. It is only upon the ground of reason that the necessary distinction between an inherent law of our being, prescribed and sanctioned by reason, and thus giving birth to a rational or moral obligation, and a force or process of physical nature, irresistibly weaving our destiny for us, and operating within and without as a blind and inexorable fate, can possibly be made or philosophically maintained. Nor can it be wise to ignore or conceal the fact that, for jurisprudence, no basis whatever exists but the natural and necessary relation of persons possessing reason to know, understanding to judge, and will to do, what is right or what wrong.

Not, then, the relation of man to his Creator, nor the relation of man to the material world, but the relation of man to man it is which presents the true and rational ground for the science of law—the science of that which determines what is just, and what unjust, as among mankind. For here it is that reason governs, or ought to govern; and here, also, that the law of our nature is constantly shown in the daily appeals which every man makes to the reason of his fellow-man; here, moreover, that history begins, and furnishes the original materials for reflection, which thence gives birth to philosophy and jurisprudence.⁸

From this point of view, then, let us briefly consider the

⁸ By reason, we mean that principle of human nature which intuitively thinks, and cannot but think, in accordance with its own inherent and immutable laws or relations of thought, and which is one and the same in all mankind—not only in essence and substance, but also in the truths it reveals. It is thus the principle of self-evident truths—truths which we think in a mental relation that instantly proves them such. This relation is the clear and perfect harmony in which they appear; which harmony is, indeed, the ultimate test of the truth of things. From this point of view the inherent law of human nature, the law which is written in the hearts of men, is nothing else than the natural harmony of the human mind—the harmonious relation

law of our nature as determining, first, natural rights, universal and individual; and, secondly, wrongs or violations of natural rights, individual and social.

The universal rights of mankind, as also their universal duties, are those which all men have in common, as forming one single universal society of which reason is the sovereign. Their individual rights, on the other hand, are those which they have in their several and distinct capacities as individuals.

Humanity naturally being independent of civil and political institutions and laws, it follows, of course, that the duties and rights of mankind as members of natural society must be considered as wholly independent of their duties and rights as members of civil and political states. The state of nature, or natural state of man, in which the laws of nature arise, and to which they peculiarly apply, is the state in which mankind exist regardless of positive laws—that is, as citizens of the world, equal in right, subject to no law but that of their nature, and to no superior but their common Creator.

of reason and will, in the consciousness of each individual reflected as the essential harmony of his own existence.

From harmony, from heavenly harmony,
This universal frame began;
From harmony to harmony,
Through all the compass of the notes it ran,
The diapason closing full in man.

—*Dryden's First Ode for St. Cecilia's Day.*

And this harmony is twofold: it is either purely mental, as of the relations of thoughts or ideas in the mind, and, as such, is wholly internal; or else it is social, as of the relations of reasonable and free beings in society, and, as such, is relatively external, being, so to speak, the internal externalized—primarily, by those relations themselves, and, secondarily, by the outward actions of men.

A universal harmony of thoughts and ideas should embrace all laws, all truths, all authorities, in one; but is only conceivable as existing in the All-comprehending and Omniscient Mind. Yet it seems necessary to assume, what in itself is the basis of all proof, that this universal harmony is naturally, though it may be imperfectly, reflected in human reason; or else to affirm, what but few are willing to admit, that not a glimmering of immutable truth, not a ray of eternal light, can ever illumine the mind of man. Reason, then, is the soul of the law. Co. Litt. 394 b.

A variety of views and descriptions of this state are given by writers.⁹ But most agree that the natural state or condition of men is one of equality and independence ; that men are naturally as independent of each other as they are dependent on their common Creator and preserver. Some there are, however, who deny that any individual is naturally independent of the common authority of all, and hold that the sovereignty of the world is naturally vested in all mankind in common, and cannot, therefore, be exercised by any individual, not even with respect to himself, unless by the common consent of all. Whence it follows that no particular nation or people can rightfully establish their sovereignty over any given portion of the earth without the given consent of all mankind. And this, indeed, would seem to be the doctrine of some in this country, who deny that the people of any one state of our union could have ever been sovereign without the given consent of the people of the country at large. It is evident, however, that the absolute rights of individuals—those of life, liberty, and the pursuit of happiness—cannot be made to depend upon common consent, or upon any authority other than such as equally exists in each and in every individual of our race. But let us consider the natural grounds on which a common and sovereign authority may seem to rest.

Whatever pertains to man must be referred to the principle of humanity, as one and the same in all men, as necessary and universal ; or else to some one individual, as belonging, not equally to all, but only to him in particular.¹⁰ No man is merely an individual, since something of the principle of humanity, which is one and the same with itself wherever it exists, and whatever the form in which it exists, must necessarily inhere in everything human. Thus human reason, wherein only is humanity self-known, though possessed by each individual, at least in degree, is not in itself individual.

⁹ See Puffendorf's *Law of Nature and of Nations*, book ii, chap. 2, "The Natural State of Man."

¹⁰ See M. Victor Cousin's *History of Modern Philosophy*, Wight's translation, vol. 1, pp. 193 to 210—Lect. X., tit. "Great Men."

but universal, essentially the same in all men, and, therefore, a self-sufficient authority—an authority *per se* for and among all reasonable beings.

Now, reason, which alone takes cognizance of things universal, prescribes to mankind a law of their nature, as one in all and for all. And, as the power of exercising one's force or liberty is no further a right than as it is approved and authorized by reason, it is on this approbation of reason, in the last resort, that all rights are established.¹¹ Thus reason itself is the first rule of man,¹² the first principle of morality, and the immediate cause of all primitive obligation.¹³

Indeed, as every one knows, it is not his peculiar or individual character, not the fact that he is this or that particular person, but his universal nature, his humanity (which is no more his than it is every other's), that entitles him to assert and maintain those rights which are inherent in humanity, and, therefore, beyond the power, not only of his own will, but of the will of every other.

In unfolding itself as the primitive and natural criterion of right and wrong, reason is legislative; it assumes the office of natural law-giver to all reasonable beings, and so ordains the rational and universal government of the intelligent world—to maintain the supremacy of which should, we conceive, be the natural aim and highest aspiration of beings having reason to perceive and know, understanding to judge, and will to do, what is reasonable and right, or what unreasonable and wrong.

To assure ourselves that natural law is not merely a name, that natural jurisprudence is a necessary science, we have only to consider that intelligent beings, like men, would naturally aspire to government of some kind; that government supposes a ruling principle or power, and that man's own nature is such that it suggests the existence of that principle or power, in some way or form, ideal or real. Religious sentiment invests it with the mysteries of religious

¹¹ Burlamaqui, *Principles of Natural Law*, Part I., c. 8, § 5; c. 9, § 4.

¹² *Ibid.* c. 5, § 9; c. 6, § 1 *et seq.*; c. 8, § 1.

¹³ *Ibid.* Part II, c. 7, § 13.

faith; nature leads to its recognition in laws or forces of the material world; while the study and philosophy of man discover its original in the mind itself. Man's history can be nothing but the development of his nature; and that we conceive to be such that his first law should be his religion; his second, the world of sense; and his third and last, the spirit of humanity self-recognized—a principle inherent in man, such as reason; such as is common to all mankind; the same in all ages and countries alike, and competent to rule by force of its internal dictate alone.¹⁴ Sooner or later, in the history of man, reason should assume its rightful sway; and he who was first to say that man should be governed by the dictates of reason was the first to announce the ruling principle of that universal government to which all men are naturally subject, to which every human being is bound by a natural and indissoluble allegiance, and to which all men alike must ultimately look for the sanction and protection of their rights.

The only free government is the government of reason. Nothing is more necessary to a free people, who value their freedom and desire to preserve it, than the knowledge of this government, the principles in which it is founded, and the natural relations of men—without a conformity to which it can neither be established nor preserved. And this consideration, it is hoped, will justify an effort to unveil the foundations of liberty and laws.

¹⁴ Of this law Cicero eloquently speaks: *Est quidem vera lex, recta ratio, naturæ congruens, diffusa in omnes, constans, sempiterna, quæ vocet ad officium jubendo, vetando a fraude deterreat: quæ tamen neque probos frustra jubet, aut vetat; nec improbos jubendo aut vetando movet. Huic legi nec abrogari fas est, neque derogari ex hac aliquid licet; neque tota abrogari potest. Nec verò aut per senatum, aut per populum solvi hac lege possunt: neque est quærendus explanator aut interpret ejus alius. Nec erit alia lex Romæ, alia Athenis, alia nunc, alia posthac; sed omnes gentes, et omni tempore, una lex et sempiterna et immutabilis continebit; unusque erit communis quasi magister et imperator omnium Deus. Ille legis hujus inventor, disceptator, lator: cui qui non parebit ipse se fugiet, ac naturam hominis aspernabitur; atque hoc ipso luet maximas pœnas etiamsi cætera supplicia, quæ putantur, effugerit.* Cicero de Republ. lib. 3, apud Lactant. Instit. Divin. lib. 6, cap. 8.

But, if to establish the government of reason and nature should be a principal aim with all mankind, we ought to be able to find some evidence of efforts in that direction ; for, in the history of man, we shall always find that every real want has given birth to efforts designed to supply it. Behold, then, the works of the writers of morals, of ethics, of natural law.¹⁵

Grotius, Puffendorf, Vattel, and many others, as authorities universally well known, are everywhere quoted upon questions of natural right. Perhaps it is asked, what authority had they to prescribe law to all men? This question is answered by considering that they addressed themselves only to the reason of mankind ; they assume to speak only the voice of reason ; their method is that of reason appealing to reason ; their authority, therefore, none other than the sanction that every man's reason must give to what reason has dictated, and to what is shown to be reasonable and just by the harmony and consistency of the principles and doctrines enounced and maintained by them. From declaring the law which reason prescribes to all, and appealing to the reason of each, their authority is recognized and conceded, and this is what establishes their claim to our regard as expounders of the universal law. Indeed, so far as they agree with themselves and each other, and can be cited for one and the same view or opinion, and to one and the same point and effect, it will seldom, if ever, be found that their authority is questioned by thinking men, or disputed in courts of public justice. As natural law judges concurring and agreeing with each other, they form a sort of natural judiciary, and are accordingly respected all over the world.

Here, then, we discover the true, and the only true, test of the original and inherent authority of this science ; and this test we find in that perfect consistency of views and opin-

¹⁵ The natural lawgivers of the human race are all who, either by their precepts or examples, or their sayings or writings, have contributed to good morals or good manners among men. For natural jurisprudence is nothing else than the great code of moral truths, written and unwritten, which serve as guides to proper self-government.

ions, that universal harmony of principles, of thoughts and ideas, without which even the boasted certainty of mathematics would vanish, and within which is contained the evidence, and the only evidence, of a clear perception and perfect understanding of things. The science of the law is the mirror of the law; for, the law of man's nature being one and the same with itself wherever human nature exists, the science thereof can be evidenced only by that harmony of thought with thought, and of mind with mind, wherein its oneness with itself is clearly reflected.¹⁶

Hence discordant views, conflicting opinions, irreconcilable doctrines, which show the law as if at war with itself, must always prove an ignorance of the law, whether such views, opinions, or doctrines be those of one mind, those of one writer or expounder of the law, or those of many and different minds. For, as harmony is the test of science, so contradiction is the test of nescience. By this test, therefore, we judge, and must in turn be judged.¹⁷

¹⁶ As expressed by Austin, the test of authority is "that concurrence or agreement of numerous and impartial inquirers to which the most cautious and erect understanding readily and wisely defers." Austin on Jurisprudence, p. 126.

¹⁷ The law, as a practical science, consists of principles and their relations to human action; also, of definitions, distinctions, consequences, and rules—all inseparably wedded to much matter of illustration, and an equal array of learned ignorance and confusion. The law, considered as an existing principle itself, is the principle of universal harmony which pervades all nature, tending to the preservation of all things in their order, and to the maintenance of what is good, right, and just on the one hand, as opposed to what is evil, wrong, and unjust on the other. As such principle, it engenders, and through human reason imposes, a universal obligation to do good and shun evil, from which obligation arise all our duties and rights, the positive law being but the positive recognition and sanction of these original duties and rights, and of the means of their security and protection.

The acts of the will, the objects of the law—or, rather, the objects to which the law is applied—are not considered with reference to their number, shape, or size, and, consequently, the science of law is not mathematics, nor are its fundamental principles to be reached by inductive logic.

By first or fundamental principles is properly meant self-evident truths—truths intuitively perceived (as the mind is developed to self-recognition), and of universal authority and obligation. There are many equivalent, or nearly equivalent, expressions—as universal principles, principles of universal reason,

But if, with universal reason, we have a natural lawgiver, a universal legislator, and, with the moral philosophers, ethic-

of universal (original or natural) justice, of natural law or natural right. We cannot reach the universal, however, except by intuition. Yet we know that human nature, the inherent laws or principles of the mind, and every essential of man's being, are universal. In truth, except as a part of the universal—that is, without a world in the mind—we cannot seize on a piece or a part. What does he know who knows, not something, but only pieces of something? "There is," as Austin says, "a wide and important difference between ignorance of principles and ignorance of particulars or details. The man who is ignorant of principles, and unpracticed in right reasoning, is imbecile, as well as ignorant. The man who is simply ignorant of particulars or details can reason correctly from premises which are suggested to his understanding, and can justly estimate the consequences which are drawn from those premises by others." Austin on Jurisprudence, 131.

First principles are in the nature of universal judgments arising in the mind (not really from, but in the course of, its reflective thought), and are one and the same in all minds, however variously expressed, serving the reflective student as unvarying and unceasing lights upon the ocean of enquiry, competent to reveal the true relations of every object, and to dispel doubt as the rays of the sun dispel darkness. The principle of principles is reason; for, in the words of Coke, "*Ratio est radius divini luminis.*" Co. Litt 232 b.

Universal judgments of right and wrong being given as the original principles of justice, we thence reason from them to other judgments. These other judgments, however, being results of reasoning, study, and reflection, they are always subject and open to be reexamined, and thence reaffirmed or overruled, or explained and qualified. Not so of the first principles of justice themselves; for these, however often reviewed, must as often be reaffirmed.

For some purposes we distinguish the principles of the law from the law itself, and the law itself from the science of law or jurisprudence. The law of nature, we say, conceived as existing *per se*, is the *ordo ordinans*, the eternal principle of universal harmony, or, in the words of Bishop, "the order which pervades and constrains all existence" (Bishop's First Book of the Law, § 36; see, also, his Criminal Law, vol. 1, § 1), and this order or harmony we distinguish as both within and without the mind, and, whether the one or the other, affirm it to be the ultimate criterion of right and wrong. Jurisprudence begins with the perception of this criterion—that is, with the knowledge of good and evil—which determines and obliges to what is right, and engenders a fear of evil. One who is incompetent to this distinction is, therefore, incompetent to anything wrong; and this, in different forms of application, is a familiar principle.

It is not always useful, nor always convenient, to observe the distinctions between the law and the principles of the law, or between these and the science of the law. Nor is it necessary that we should do so; for it is all one and the same whether the law, its principles, or our knowledge of them obliges us. It may, indeed, be doubted, for it cannot be demonstrated, that the mind,

ists, and natural law writers, a natural judiciary, we ought to be able to find, somewhere in the nature of things, a force

in perceiving the law, its principles, and their harmony, perceives nothing itself; for the mind itself is the reader and interpreter of all things, the first author and last authority, beyond which the foundations, the walls, the ceiling and the floors vanish and leave not the substance of a dream.

The law of our nature in relation to the different systems of positive law may be compared to our globe in relation to the different political states of the world. As our globe is the theatre of all human activity, so the law of our nature is the ground-work of all human laws; and, as our nature cannot easily be thrown off, so neither can the law of our nature be wholly ignored.

We are not speaking of that law which we cannot but obey—the law of purely physical phenomena—but of the law which we constantly break, while seeking to hold others to its strictest observance—that is, the law of our nature.

The principles of this law being natural and original foundations, they cannot be changed by any human legislation, nor by any human judge. None of these principles are new; they are as old as human nature itself. Yet they are, indeed, the chief glory and pride of our American system. "It is pretty plainly the better opinion in our country that there are limitations upon the legislative power other than what are expressed in our state and national constitutions. Bishop's First Book of the Law, § 90, and cases there cited. Statutes passed against the plain and obvious principles of common law and common reason are absolutely null and void, as far as they are calculated to operate against those principles." *Ham v. McClaws*, 1 Bay, 93—*Barkesdale v. Morrison*, Harper, 101. See Bish. *id.* § 90, and other cases there cited.

Hence it is that, in conformity with these principles, the judges must, in proper cases, go outside the mere statutes and former decisions for the principles on which they are to adjudicate the particular matter before them. Bishop's Cr. Law, § 18, 4th ed. But, the principles which require them to do so being coeval with human reason, being known in all ages, and always recognized as fundamental to human laws, it of course follows that no judge can predicate his decision on a wholly new principle, and that a statement of law wholly new and original can have no foundation in justice or in truth. Therefore, novelty in the law is to be avoided. 7 Co. Pref. Fras. ed. x.

Bishop seems to think a law writer should be original. See his First Book of the Law, §§ 263–267, 307. The writer of this article, however, being ignorant of any real originality in the modern world of thought, and having no respect for that puerile originality which consists in new expressions of old truths, insists upon the authority of Coke, and begs leave to give notice that (fearless of actions of trover and conversion) he means to appropriate the truth of the law whenever and wherever so fortunate as to find it. "Like any man's knowledge is gotten by original research. It mostly consists of results gotten by the researches of others, and taken by himself upon the money." Austin on Jurisprudence, p. 128. But the law as a science is a system

ne kind to serve as a natural executive power. Behold, again, the sceptre of reason, the living argument of justice

principles which, however ancient their first recognition, are all-comprehensive, and capable of infinite application. And, hence, "he who, whether a judge, or as a lawyer arguing a cause, or as a legal author, brings forward new applications of old principles, does not attempt the introduction of novelty; he merely expounds anew the old." Bishop's First Book of the Law, § 93. "One cares little about novelty in cases, if they fall within given principle." Per Wood, V.-C., in *Ainsworth v. Walmesley*, 44 L. J. 252.

The principle or reason upon which a rule of the law is founded is always broader and more comprehensive than the rule itself. And the rule itself, in like manner, often becomes the principle or reason of more particular rules. Thus we say it is a principle—sometimes we say it is a general rule—that a trustee cannot become the purchaser of his trust estate. The broader principle or reason on which this rests is that he cannot rightfully assume a position which is hostile to his trust, or inconsistent therewith. The fundamental principle pervading the whole subject limits or qualifies subordinate rules. Thus a trustee may purchase the subject-matter of his trust, under the sanction of a court of equity, where it is clearly to the advantage of the beneficiary or *cestui que trust* that he do so. For the broad reason or principle governing the relation is that the trustee ought always to do whatever appears to be the most beneficial to the *cestui que trust*. Again, it is a familiar rule that a tenant cannot contest the title of his landlord. The reason—the broader principle—is that he who holds in another's right cannot deny that other's right. And this applies also to bailees, servants, and agents. But of such matters in another place; we are here concerned only with the fundamentals of our science.

The most difficult of all things to attain is here the most necessary—that is, a scientific method. It is conceived that such a method is possible, but possible only on condition of finding it in the relation of principles or laws that arise in the mind spontaneously with its thinking activity, and govern that activity. That there are such principles or laws will not be doubted by the reader who reflects for a moment that, in comprehending this sentence, he comprehends it in its unity as one sentence, in its diversity as composed of various different words, and in its harmony as expressive of consistent ideas. To comprehend an object of thought is thus to think it in its unity, in its diversity, and in its harmony; and this because that simple intuition of our being which arises with self-consciousness is ever affirming the self and its unity, the not-self and its infinite diversity, and the harmony in which they co-exist. Let it, therefore, be admitted that all reflective thought must, at different times, be occupied with one, to the exclusion of another, of the three ideas suggested, namely: the idea of unity as ever present in the self-consciousness of the *ego*, the idea of diversity and infinite variety as inseparably associated with the perception of the *non-ego*, and the idea of harmony as arising from unity and pervading all existence.

and right which rules the minds of men, and which, in the course of its historic development, causes revolutions of the

The conclusion is that, as relative to jurisprudence, a scientific method requires that every fundamental idea, principle, and doctrine be stated, not only in its order, but also at and from the three original stand-points of reflective thought, the ego-istic, the non-ego-istic, and the harmonious co-existence of the two, as the practical stand-point (= the actual and legal): *e. g.*

IN RELATION TO MORAL LIBERTY.—(1) *Ego-istic*.—Reason (the rational mind, or *ego*) is self-governing, and is, in its self-consistent thinking and judgment of right and wrong, law to the individual man. (2) *Non-ego-istic*.—The universe, or *non-ego*, determines the individual in all things. (3) *Practical*. (= common sense, or the actual and legal).—We feel that we are morally responsible beings, and yet that we are (in an unknowable degree) the creatures of circumstances; in other words, that we are morally responsible for relations of existence which we have willed, even though they necessitate our subsequent action and condition

IN RELATION TO RIGHTS.—(1) *Ego-istic*.—Rights (absolute or relative, identical with duties) are the directions of reason. To say that reason directs as to the performance of an act is the same as to say that it is our right, or our duty, to perform that act. (2) *Non-ego-istic*.—Rights are mere physical powers. (The sense of duty, if not senseless, is useless at least.) (3) *Practical*.—Rights are moral powers, sanctioned by common sense or by agreement.

IN RELATION TO THE POLITICAL STATE.—(1) *Ego-istic*.—Political sovereignty is the right of wisdom, goodness, and power to govern ignorance, vice, and imbecility. (2) *Non-ego-istic*.—Political sovereignty is the superior right of superior might—the right of the sword. (3) *Practical*.—Political sovereignty is the combined wisdom, goodness, and power of the members of the political community vested in officers or agents selected and empowered pursuant to the organic compact.

IN RELATION TO POSITIVE RIGHTS.—(1) *Ego-istic*.—Positive rights are natural rights, sanctioned by the commands of the political sovereign. (2) *Non-ego-istic*.—All rights are privileges granted by the sovereign, and sanctioned by his commands. (3) *Practical*.—Positive or legal rights are moral powers prescribed and sanctioned either by or pursuant to the organic law of the state.

This only by way of suggesting what is involved in a scientific method; for the idea at each point of view could hardly be stated correctly and fully on less than twenty pages. The contradiction between the *ego-istic* and *non-ego-istic* is not important except in matters fundamental to our science. As we descend from the clouds and look on the practical world our observations will naturally be made from the practical stand-point; or, if not wholly made from practical points of view, will be stated principally with reference to them.

It is apparent that the writer of jurisprudence—the earnest student, also—should always have in mind the differences resulting from the different

social and political worlds; overturns their ancient constitutions, their original organic forms, and thus, in the order of

points of view, though his purpose be only to state that harmony and consistency of doctrine in which all minds appear to agree, and which may and should seem to be only the simple truth of common sense.

The legal and lawyer-like method is given by Bishop, as resulting from "the threefold nature of the law"—that is, from the law as consisting of "legal principle, legal reason, and legal authority." (See Bishop's First Book of the Law, chapt. X.) Thus, as he says: "In the law, when we would determine a point, we sometimes lay down a principle—that is, mention a principle which is admitted to exist in the law—then reason upon it, and thus derive the result, without saying, in terms, anything about authority." He is speaking, however, of the common law (as distinguished from the statute law), and, from the cases reported, he clearly shows, in respect of that law at least, that the principles of a case, the principles on which a case is decided—not the applications which are made of those principles—are the law of that case. (See, of his First Book, §§ 99–105.) "The law is a system of principles, and the principles are the law itself, while the cases are only to be received in the nature of evidence, tending more or less strongly to prove the principles, as well as to make apparent another thing—namely, that the common-law principles do not, like the statutory ones, rest in a precise form of words." (*Ibid.* § 103.)

If, however, we would survey the whole of jurisprudence, even so far as to obtain a correct view of its leading principles, our method should be all-comprehensive, and yet comprehended as a simple and uniform process of reflective thought. We should, if the writer has rightly conceived the method, first bring our mind to the contemplation of the law as a whole—that is, as a universal principle. Our next step should be to define that principle (with caution—that is, in view of the snare which the nihilist has always set for all who venture on the way of definition). While taking this step, we should remember that human language is but a picture of thought at best, and that often a treacherous meaning lurks where least we suspect it. The next step we take should be to comprehend the principle in its relations to history, to the world of human action, and divide accordingly. Truthful analysis is here all-important; and we should bear in mind that our commission gives us no power to create, but only a right to discover the true relations, and point them out as so many branches. Now, we have nothing to do but to repeat our method till we have exhausted the subject—that is, nothing to do but to treat each branch, the principle in each of its true relations, as we treated the principle itself. In each of these relations or branches we should first be able to perceive the principle, then to define it, and then—from comprehending its more particular relations, as defined—divide accordingly.

To illustrate the steps and the way, we commence with a unit—the law. This we define as being that principle of harmony which pervades all nature, and which, for the mind that perceives it, is the ultimate criterion of right and wrong. (We see we are nearly ensnared.) It is of the very

things, remodels old, and gives birth to new, systems, and holds the way open to the progress of the race.¹⁸

In whatever way we distinguish these original powers, whether as the natural legislative, judicial, and executive powers—powers analogous to those hereinafter considered as constituting the political sovereignty of a people—or by other less significant names, one thing is certain, at least, that they are veritable elements in the history of mankind, and constitute the universal government of the race, the natural, as distinct from the political, state, which is supported and sustained by the inherent force of those universal rights which regard the moral liberty and sovereignty of humanity: the rights of conscience, the freedom of opinion, and the like, which cannot be rightfully, or long, subjected to any

essence of a truthful definition of a principle, that it leave it unshorn of its universality, while drawing it down to the sphere of the practical understanding. Coming to the branches, to the comprehension of the principle in its relations to history, the difficulty lessens; the process of definition, as applied to one of these branches or relations, results simply in “a brief enunciation of the law governing a particular subject, or branch of a subject, known by a particular name.” (See Bishop’s First Book of the Law, § 261.) Thus it is a received definition of the civil, positive, or municipal law—which is only a branch of law in general—that it is a rule of action, prescribed by the supreme power of the state, commanding what is right, and prohibiting what is wrong. This is as much as to say that the law of laws is that all human legislation shall be a rule, or a body of rules, prescribed by the sovereign of each state, commanding what is right, and prohibiting what is wrong. Montesquieu, and a hundred others, the most completely self-recognized minds, have all insisted that law in general is human reason; and that the political and civil laws of every people ought to be the applications of human reason to the particular cases (relations) of human action. And were they what they ought to be—namely, a harmonious system of reason, comprehending all possible relations—they would be of absolute and universal authority, according to that final and ultimate text of authority, which was the subject of the text, and to point the way to which was the object of this note.

¹⁸ Austin (on Jurisprudence, p. 232), speaking of international law, says: “The duties which it imposes are enforced by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.” But man fears evil because only of self-love. It is not fear, then, but self-love, that obliges a man to observe the law of his nature; or, which is the same, that obliges a nation or a sovereign to observe the law of nations.

merely instituted power, or justly or permanently controlled by any political laws.

Some things there are, as every one knows, which have an ideal or moral existence only, such as the natural state, the political state also, and a host of other moral and political entities,³⁹ which, though ever existing in the minds of men, have never had, and never can have, an actual visible existence. If, for instance, we look for the political state, we find it only in the political relations of men, and the political duties and rights which flow therefrom. If we look for the elector, we find him a natural, and not a political, being, invisibly connected with other men by certain political ties. So, in like manner, if we look for the natural state, we find it, if at all, in the natural relations of men, and the duties and rights which thence arise, which reason prescribes, which writers of ethics assume to expound, and which the consciences of individuals, and often revolutions, enforce. And here, without doubt, in the natural state, in the universal society of mankind, it is the business of jurisprudence, as the science of law, to discover those principles, and even those powers, which, in all ages and all countries alike, are the original groundwork of the political and civil state.

But here, in regard to the moral effect or obligation of natural law, also concerning the universal *status* of individuals, considered as members of the human family, and independently of civil and political laws, a question of the highest importance arises. Have all men naturally an equal right to determine and decide what is right, to speak for reason, their common sovereign, to say what reason dictates, to expound its authority, and, in fine, to execute its laws?

All agree that all men are naturally equal in right. Nor can it be questioned that the principle of humanity, whatever we assume it to be, is one and the same with itself in all the individuals of our race; that, therefore, all men are equal in natural right and as morally responsible beings. If, therefore, one has a right to decide what the law of our nature requires, to speak the voice of the sovereign, and to

³⁹ See Puffendorf's *Law of Nature and of Nations*, b. 1, c. 1.

say what is right or what wrong, that right is naturally common to all, and the opinions of men upon questions of right are of equal authority, and entitled to equal respect. Universal society is thus, after all, without any sovereign on earth, and the government of reason, to which all owe allegiance, is one of which every individual is the head.²⁰

It is clearly impossible that reason itself, as one and the same in all, and, therefore, as a universal authority *per se*, or as universal law, could ever, by any individual, be infallibly and authoritatively uttered and expressed as such, in the language and form of commands or definite propositions. That reason or nature could thus become known as universal law, has never been claimed or pretended by any.²¹ To think, with some people, that the law of our nature is innate, as it were, in our minds, and actually imprinted on our souls from the first moment of our existence, is supposing a thing that is not at all necessary, and is, moreover, contradicted by experience.²² But agreed it is that the law of nature is, and ought to be, known by the mere light of reason.²³ Considered in itself, as one and the same in all, reason is, without doubt, the original authority upon questions of natural right, but an authority which every individual is equally free to invoke, interpret, and apply according to his own understanding of what it prohibits or enjoins. It is impossible to conceive that beings, the same in nature, can differ in natural right. Now, mankind are all of one nature; all possess reason and will, and they differ in these no more than they

²⁰ Admit that wisdom, goodness, and power, all the virtues, combine together in the constitution of true and legitimate sovereignty. No man is bound to concede to another the possession of these in a superior degree: but each is free to judge for himself of their existence and effect. Were men in fact unequal in nature, this could not avail us. For, if nature is law, then the nature of each would be his law; and, each being obliged by his nature, no one could have a right over another, but over himself only. There is clearly no ground for natural jurisprudence but the oneness of our nature in all—whence the equality of men, their equal rights, and their equal subjection on the one hand, and equal independence on the other.

²¹ See Puffendorf's Law of Nature, b. 2, c. 3, § 13.

²² Burlamaqui, Pr. of N. L., Pt. II, c. 5, § 1.

²³ *Ibid.* c. 5, § 5.

differ in the actual development of their natural powers. But surely the rights which inhere in the nature of man cannot depend upon any particular degree to which his nature may be developed.

Men differ, doubtless, in that faculty of understanding which depends upon experience and reflection. Every individual is endowed, not only with reason—an intuition of his nature and existence—but also with a power of self-determination or will, which is seen in his thought no less than his action. It is only by virtue of his will that a man can study or attentively reflect.²⁴ It is only from study and reflection that he comes to have any understanding. The understandings of men are, therefore, different, unlike, and unequal.

Short of perfection, men's understandings must necessarily differ, especially concerning such things as are not the objects of sense-perception—such as the principles of law, of duty and right, and the like—which, being diversely perceived, must be differently understood; and so of all reasoning thereon, or relative thereto; of all matters that rest in presumption or inference, in judgment based upon study and reflection; here, too, the justice and force of such reasoning, presumption, or inference will, in turn, be differently perceived, and again reflected in as many different judgments as there are different minds to judge. “*Quot capitum vivunt, totidem studiorum millia.*” Suppose, then, that all men are equal in right—that the opinion of one on questions of natural right must be received as of equal authority with the opinion of another. Why not, indeed? Who, among equals, may claim a superior jurisdiction? To whom, among men, is given omniscience to know, or a divine commission to proclaim, the eternal and immutable rule of right? It matters not that one declares he believes to be right what another affirms he believes to be wrong. The ultimate, original, and absolute authority, the only authority in final appeals, is uni-

²⁴ Hence the folly of those arguments by which it attempts to disprove its existence. Intelligent self-determination precedes all reflection and argumentation. How, then, shall these destroy or bring it in doubt?

versally diffused, and exists in as many different minds as there are different men in the world; and, all being equal in nature and in right, all are equal in authority, and the opinion of one is as good as the opinion of another. Nor does it matter that this infinite diffusion of sovereign right is anarchy itself; at the other extreme is its concentration—absolute despotism. The voice of each, then, is the voice of the sovereign. Universal suffrage—that is, universal anarchy—is the natural state of man. Republican governments are successful only in so far as they fail of their end—universal equality. For, this attained, anarchy ensues; and, from one extreme to its opposite being natural and easy, despotism follows. In theory we are driven to absolutism on the one hand, or to anarchy on the other, though left the boon of a choice. We prefer the latter.

From these considerations it plainly appears that all human rights are originally individual—that is, derived from no principle or sovereign authority but that which inheres in the nature of each and every individual alike. There is, then, no sovereign right which naturally resides in all mankind in common, and which no single individual, or portion of humanity, can exercise, without the common consent of all.²⁵ Every human being is naturally a sovereign, and his opinion of right is morally as potent as that of any sovereign on earth. Let us not be dismayed at the truth. Perhaps from chaos something may emerge.

The natural rights of man, considered from the individual point of view, as corresponding to the internal and external relations of his being, are primarily distinguished as either absolute or relative. They are absolute, as arising from the

²⁵ "Human society is, simply of itself, and with regard to those who compose it, a state of equality and independence. It is subject to God alone; no one has a natural and primitive right to command; but each person may dispose of himself, and of what he possesses, as he thinks proper, with this only restriction, that he keep within the bounds of the law of nature, and do no prejudice or injury to any man." Burlamaqui, *Pr. of N. L.*, Pt. II, c. 6, § 1. "It must, therefore, be agreed that sovereignty resides originally in the people, and in each individual with regard to himself." *Ibid.* *Pr. of Politic Law*, Pt. I, c. 6, § 6.

internal relations of his reason and will, and as concerning no one but himself; they are relative, as arising from his external relations to other men, the concurrence of his reason and will with their reasons and wills, his agreements with them, and his conduct as a member of society.

The rights which are absolute, inherent in man's nature, and therefore inalienable, and which every individual may consequently assert, maintain, and defend against his fellow-man, without any positive agreement or consent between them, are principally three—viz.: the right of life, the right of liberty, and the right of property; the right of life, as not only the right to exist, but as the right to do whatever a man may judge to be necessary to self-preservation; the right of liberty, as the right of one to govern himself according to his will, in all that peculiarly and immediately relates to himself, and does not equally relate to others; the right of property, as the right of one to the necessary means of discharging his duties. These are the three great rights which lie at the foundation of all others; and these are original, inherent, and inalienable; in themselves and their relations, as will herein appear, supplying the principles of all right action; and the necessity of their protection is the only legitimate foundation of the civil and political state.²⁶

The right of life is the right to the full and free enjoyment of man's whole nature—physical, moral, and intellectual—which enjoyment is happiness, a state of existence only to be found in the seasonable employment of every energy and faculty of our being; or, as Aristotle would say, in energizing according to nature. A faculty, genius, or talent, unem-

²⁶ Austin (on Jurisprudence, p. 753-754), from having found out that nothing is law but the command of a superior made known to an inferior, and that nature is nothing but a senseless word, concluded that "natural or inborn rights are those which reside in a party [not in a person, for a person is nothing but a fictitious character assumed by an actor of a part in a play] merely as living under the protection of the state," and that "there are no such things as absolute rights." It is generally supposed that Austin was an Englishman. It will probably be found, in explanation of his depths, that he never saw over the walls of Romulus, and studied the Leviathan within them.

ployed or misdirected, is a curse to its possessor. Hence unhappy people, in every part of the world, and in every condition of life : those who excel in mental and physical accomplishments, aiming at neither to the total exclusion of the other, but seeking the fullest perfection of their nature, being of all people happiest, and least disposed to complain of what the unhappy call freaks of fortune.

The absolute right of liberty, or self-government, is the original principle of human sovereignty. Conscious of himself as existing, man is equally conscious of his natural freedom, liberty, or power of self-determination ; the right to the reasonable exertion of which is also a natural, absolute, and perfect right. Natural liberty is the right of self-government ; and this we define to be the right of a man to govern himself, in things peculiarly concerning himself, by what his own reason prescribes as reasonable, or by what his own nature assures him is natural ; and, in matters where others with him are equally concerned, by his agreements with them, and the laws prescribed by common consent.

Analytically considered, self-government involves three powers or capacities, viz. : first, the legislative, the power to make laws or adopt resolutions for the direction of one's personal affairs, and the government of his actions—this corresponding to the office of reason ; second, the judicial power, or power to judge of the meaning and true application of laws or rules, in view of the particular relations of time, place, persons, and things—this pertaining to the practical understanding ; third, and last, the executive power, the power to enforce the laws as explained and applied—this being, naturally, the power of the practical will.

Here, then, in the human mind, we at once perceive the ever-enduring principle of sovereignty itself, with all its branches—legislative, judicial, and executive. It is only in the possession of these three powers—that is, of reason to perceive and know, of understanding to judge, and of will to do, what is right or what wrong—that man is a morally responsible being. If any of these be wanting, self-govern-

ment is impossible; in the full possession of them all, man cannot but feel that he is morally responsible for the course he pursues, and this feeling or sense of moral responsibility is what we generally mean by conscience.²⁷

The original of all legislative power is reason itself, which, as the principle of our being wherein only is our nature self-recognized and known, is the natural sovereign of all mankind. Thus reason itself is the first rule of man, the first principle of morality, and the immediate cause of all primitive obligation.²⁸ Wherefore law, in general, is human reason, and the political and civil laws of every nation ought to be only the particular cases in which human reason is applied.²⁹

Now, since all men are naturally equal, as moral beings, and in moral right, and since they are, in their nature, as independent of one another as they are dependent on their common Creator and Preserver,³⁰ it follows that each has a right to govern himself, in all that peculiarly and immediately relates to himself, by what his own reason determines as right; that sovereignty, or the right of command in the last resort, resides originally in the members of society, and in each individual with regard to himself;³¹ and that, as this right is inherent in, and inseparable from, our moral nature, it cannot at all be controlled by positive laws, except so far as, in matters of common and equal importance to all, the judgment of each is included in, as fixed and determined by, the common consent of all. Hence the distinction between internal sovereignty and external sovereignty—the former being wholly inalienable; the latter, determinable only by common consent.

Liberty, sovereignty, or the right of self-government, as

²⁷ See Puff. L. of N., b. 1, c. 3, §§ 4, 5, *et seq.* Burlamaqui, Pr. of N. L., Pt. II, c. 9.

²⁸ Burlamaqui, Principles of Natural Law, Part I, c. 5, § 9; c. 6, § 1 *et seq.*; c. 8, § 1; Part II, c. 7, § 13.

²⁹ Montesquieu, Spirit of Laws, b. 1, c. 3.

³⁰ Burlamaqui, Principles of Politic Law, Part I, c. 6, § 4.

³¹ *Ibid.* § 6.

external and relative, is simply the right of each member of society to an equal voice with every other in determining questions of equal importance to all—that is to say, it is simply the principle of the natural equality of the members of society, as extending to matters in which they all are equally interested, and by which one and all may be equally affected in their relations to each other; and, as this equality in right is natural and inherent, it is, therefore, inalienable and wholly independent of agreement or positive law. Viewed as internal and absolute, the liberty of each must, therefore, consist in the exclusive direction and control of matters immediately affecting himself, and not equally involving the welfare of others. Here, then, is the natural and necessary boundary-line between our several jurisdictions. Matters affecting the social relations, and of equal importance to all, must be determined by common consent. All other things—matters peculiarly affecting one's self, and not equally involving the common weal—are subject to one's own exclusive jurisdiction. The right of self-government is relative and external, and conditional only so far as the social relations and the common interests of all are concerned. Here we consider it as internal and absolute, and, therefore, here the right of each person to govern himself, and all that peculiarly relates to himself—not by the law of society, not in accordance with the common authority, but by the law which his own individual reason prescribes—must be conceded by each to all, and by all to each, unless each, by denying the right of others in this respect, may choose to give them cause for invading his own. No man, then, may oppose another in the direction and control of his own affairs. Each member of society should so enjoy his own liberty and rights as not to encroach upon the equal liberty and rights of another, and be ready at all times to concede to another whatever, in the same relation, he would claim for himself.

³² "Know thyself, and mind thine own business," is a universal precept of natural law, handed down from the earliest ages. See Puffendorf's *Law of Nature and of Nations*, b. 2, c. 4, § 5, and note.

For we are bound to respect our nature in others no less than we are to respect it in ourselves.

The original of judicial power—that is, of the power to judge of the meaning and true application of principles and rules of human action, and to order and direct in accordance therewith—is also, as we have seen, a part of the natural and original sovereignty of the human mind; it being the power to judge of good and evil by the law which is written in the hearts of men—the original court of conscience, wherein our thoughts accuse, or else excuse, one another.³³

Perhaps it would not be unprofitable for each individual to reflect upon the proper jurisdiction of his own court of conscience—the tendency of that court to magnify its office, to usurp authority, and to sit in judgment upon the actions of those who are subject only to their own independent jurisdictions. To truly and impartially judge one's self is always a difficult, and often an impossible, task, unless it happen, as it sometimes will, that, in judging another, the judgment one passes is destined to fall on himself.³⁴

An intelligent being would naturally resolve upon rules of some kind for the government of his actions, would himself limit the freedom of his will, and therefore would, in the language of political writers, surrender a part of his liberty in order to secure the remainder! Some sort of self-government is absolutely essential to every individual. The mind of a man must war with itself, anarchy of thought, confusion of ideas, and irresolution of will must wholly prevail, unless he be under some self-control. And, all being equal as men, it naturally follows that each, within his own sphere, and so far as his actions do not affect others, is by reason and nature clothed with exclusive jurisdiction. If self-accusations arise—as they always must in the breast of an imperfect being—he himself is the prosecutor and the prosecuted; the witness, the judge, and the jury; and, in the silent court of his own

³³ See St. Paul to the Romans, II, 15.

³⁴ See II. Samuel, XII, 1–10. “Therefore thou art inexcusable, O man, whosoever thou art, that judgest; for wherein thou judgest another thou condemnest thyself!” St. Paul to the Romans, II, 1.

meditations, must pronounce the judgment, and abide the sentence of the law.³⁵ But this is the extent of his jurisdiction. He may not invade the equally rightful jurisdiction of another; for, by that act alone, he would give just cause for the invasion of his own.

The application of the law to human actions is nothing else than the judgment we pass on their morality by comparing them with the law; a judgment whereby we pronounce that those actions being good, bad, or indifferent we are obliged to perform or omit them, or that we may use our liberty in this respect; and that, according to the side we have taken, we are worthy of praise or of blame, approbation or censure.³⁶ This judgment we pronounce with respect to our own actions, or with respect to the actions of another. In the first case, our judgment is called conscience; but the judgment we pass on other men's actions is termed imputation.³⁷

35 * * * "Who has that breast so pure
But some uncleanly apprehensions
Keep leets, and law days, and in sessions sit,
With meditations lawful?"

Othello: Act III, Scene 3

"In the state of nature, every one is the supreme arbiter of his own actions, and has a right of being judge himself, both of the laws of nature and of the manner in which he ought to apply them." Burlamaqui, *Pr. Politic Law*, Pt. I, c. 3, § 7.

³⁶ Burlamaqui, *Principles of Natural Law*, Part II, c. 9, § 1.

³⁷ *Ibid.* "Conscience is properly no more than reason itself, considered as instructed in regard to the rule we ought to follow. * * * Conscience is also very frequently taken for the very judgment we pass on the morality of actions; a judgment which is the result of perfect reasoning, or the consequence we infer from two express or tacit premises. A person compares two propositions, one of which includes the law and the other the action; and from thence he deduces a third, which is the judgment he makes of the quality of his action. Such was the reasoning of Judas: *Whosoever deliveth up an innocent man to death, commits a crime*; here is the law. *Now, this is what I have done*; here is the action. *I have, therefore, committed a crime*; this is the consequence, or judgment which his conscience passed on the action he committed. Conscience supposes, therefore, a knowledge of the law—and particularly of the law of nature, which, being the primitive source of justice, is likewise the supreme rule of conduct. And, as the laws cannot serve us for rules but inasmuch as they are known, it follows, therefore, that conscience becomes thus the immediate rule of our actions; for it is evident we cannot conform to the law but so far as we have notice thereof" *Ibid.*

The original of executive power, as it exists in the nature of man, is obviously none other than the power of the practical will—a power the legitimate exertion of which is clearly essential to give to the natural sovereignty of man an efficient and determinate character, as well to carry his resolves and judgments into practical effect. If justice to one's self demands that he firmly establish the principles and rules of his own individual self-government, and exercise reason and judgment in applying such principles and rules, it as clearly and imperatively requires that he exercise also a degree of resolution, and show a decision of character and firmness of purpose, sufficient at least to insure the discharge of his duties to himself and to others.³⁸

Self-study (the study of human nature) and self-discipline are, doubtless, the surest means to the discharge of the duty and right of self-government.³⁹ If the highest right of a man is to govern himself by his own best judgment of what is right, his highest duty is to perfect his judgment, upon questions of right, by every available method and means.⁴⁰ Those who neglect this duty will, to the extent of their neglect, forfeit their right of self-government, and find superiors to govern them. Self-discipline cannot be too earnestly commended or encouraged. Men differ in nothing so much as in this. The secret of power is in self-command. This requires the most careful cultivation, and grows from nothing so much as prudence and caution in forming resolutions, and

§§ 2, 3. In the same chapter of his excellent treatise, Burlamaqui gives us many good rules in relation to conscience, the ninth of which is: "That we ought always to follow the dictates of conscience, even when it is erroneous, and whether the error be vincible or invincible." But this rule, I apprehend, is applicable only in cases where others with ourselves are not equally concerned. For, where others are equally concerned, the common conscience of all must be our guide.

³⁸ On the duties of a man to himself, see Puffendorf's *Law of Nature and of Nations*, book 2, c. 4, and Barbeyrac's notes thereto, where nearly all the fine sayings of the ancient philosophers and poets are collected.

³⁹ See Puff. L. of N., b. 2, c. 4, §§ 5-7.

⁴⁰ Concerning conscience, Burlamaqui (*Pr. of N. L.*, Pt. II, c. 9, § 4) says: "The first rule we have to lay down is that we must enlighten our conscience, as well as consult it, and follow its counsels."

a constant habit of observing such as have once been formed. To act in doubt and with indecision, or to break resolutions once seriously made, is simply suicidal; for, as it tends to undermine that confidence and faith which a man should have in himself, so it impairs the sovereignty of his mind, and renders him powerless, if not to conceive, at least to accomplish, great results.

The right of property, considered as a natural and absolute right, is of a twofold nature and character: It is the right of a man to the natural and necessary means of fulfilling his natural obligations; it is also his right to the legitimate productions of his energy, skill, and activity.

Whoever assumes that man is subject to any obligation, must also assume that he has a right to the necessary means of discharging it. This is equally true, whether we refer to the whole human race, to a particular society of men, or to a single individual. And hence it follows that the whole human race—humanity in general—is clothed with a right to the necessary means of performing its mission; that every society has also a right to the means of discharging its own obligations; and that every individual is invested with a right to the means of performing his duties. There is, indeed, no other foundation for the right of property, or dominion over external objects, than the obligation arising from nature to obey the law which nature prescribes.

Some ethical writers have considered the original of property or dominion as merely the external form, outward expression, or visible reality of the natural liberty or sovereignty of man—in other words, as the fruit of his industry. But whence the right to the original materials we labor with or upon? That right can flow only from our natural obligations.⁴¹

The greater part of the laws and regulations of human society relate to this right of dominion over external things; and, since there is little, if anything, of practical importance to be said concerning it—considered as a natural and absolute

⁴¹ On the origin of Dominion or Property, a great variety of opinions are collected in Puffendorf's *Law of Nature and of Nations*, b. 4, c. 4.

right, or as a right independent of those laws and regulations—we may properly refer its further exposition to the head of Relative Rights.

RELATIVE RIGHTS.—The writers of natural law have properly distinguished our relative rights as either perfect or imperfect. And as this distinction is of constant application, and of primary importance in natural jurisprudence, let us endeavor to explain its meaning and effect.

To well understand the distinction, we must bear in mind that the duty I owe to you, and your right to demand of me the performance of that duty, are strictly correlative. Now, there must be a law by which your right and my duty are determined. That law may be perfectly clear and free of all doubt, or it may be vague, doubtful, and uncertain. If the law be certain and clear concerning my duty, it will also be certain and clear concerning your right; and, if I refuse to perform my duty, the same law will, in this case, invest you with the further and additional right to forcibly coerce me thereto; and the reason is that the law, your right, and my duty are certain, clear, and free of all doubt. Your right and my duty are, therefore, said to be perfect. If, on the contrary, the law be uncertain, vague, and doubtful, then your right and my duty will be equally uncertain, vague, and doubtful; and, if I refuse to perform my duty, you can have no right to resort to force. Your right and my duty are here imperfect.⁴²

⁴² Burlamaqui, in his *Principles of Natural Law* (Part I, c. 7, § 8), says: "Perfect rights are those which may be asserted in rigor, even by employing force to obtain the execution, or to secure the exercise thereof in opposition to all those who should attempt to resist or disturb us. Thus reason would empower us to use force against any one that would make an unjust attack upon our lives, our goods, or our liberty. But, when reason does not allow us to use forcible methods, in order to secure the enjoyment of the rights it grants us, then these rights are called imperfect." On this distinction, see, also, Rutherford's *Institutes of Natural Law*, b. 1, c. 2, § 4. The writers of positive law employ this distinction in a different sense. Thus Cooper in his *Notes to Justinian's Institutes* (pp. 579–581): "Obligation may be divided into moral obligation, or that which receives its sanction *foro conscientie* alone; and civil obligation, or that which receives its sanction from the positive law of political communities." "Actions that mankind generally

In view of this distinction the question arises, can any of our duties or rights, as flowing from the law of our nature be justly denominated perfect? In other words, can we say that that law, with respect to the duties it imposes or the rights it confers in any case, is free from all doubt? It may be admitted, concerning our absolute duties and rights, that the law of our nature is certain and clear. The right to judge of what is right, when only one's self is concerned, as the absolute right of every individual, is one, we may say, that is certain, clear, and therefore perfect. The right of a man to act on his judgment, so far as it concerns his own affairs, is equally certain and free of all doubt; and so we may say of the right of a man to an equal voice where another or others with him are equally concerned. But, if this be true, all our relative duties and rights must be imperfect, until determined by common consent.

If the law of our nature be imperfectly known, if it remain in obscurity and doubt, or be not a matter upon which mankind have expressly and positively agreed, the duty of one and the right of another must also be involved in obscurity and doubt, and as unknown and undetermined, of imperfect obligation—serving only as a basis on which we may reason and thereby arrive at a mutual understanding and positive agreement. In this predicament are the duties and rights which some have called the offices of humanity, the performance of which is clearly of imperfect obligation, and dictated only by sentiments of kindness, charity, and generosity—though often obtruded from motives of an opposite nature—the wolf being naturally apt to care for the lamb, and the neighbor's business too often that of his neighbor.

We may readily suppose certain relations to exist, and we may readily imagine the duties and rights which are incident to

agree ought to be performed or abstained from, when not sanctioned by the laws of society, give rise to imperfect obligations; actions that are enjoined or forbidden by those laws are called actions or duties of perfect obligation." See, also, Austin on Jurisprudence, 353, 354. The perfect obligation of the civilians seems to be the same as the external obligation of the natural-law-writers. See Burlamaqui, Pr. of N. L., Part I, c. 9, § 9, in m.

them. But, when we look out upon the world of facts, we find hypothetical relations and moral abstractions nowhere equal to the wants of mankind. There are, however, three original, natural, and necessary relations, in which all men must constantly stand—namely, the relations of life, liberty, and property. It may, therefore, not be a waste of our time to briefly consider the relative rights which thence arise. Of these, then, in their order :

OF THE RELATIVE RIGHTS OF LIFE.—These, as distinguished from the relative rights of liberty and property, are only such as are incident to the family and domestic relations—the relations of man and wife, and parent and child ; to which are usually added those of guardian and ward, and master and servant. The first is the most intimate and immediate relation of life, being that which lies at the foundation of all others. The second is the natural object and legitimate consequence of the first, and naturally suggests the way to the third and fourth.

Of the relation of man and wife, considered as governed by natural law, I shall have but little to say ; as well on account of the diversity of opinions concerning the facts upon which it arises, and the facts upon which it may cease to exist, as because of the impracticable and valueless character of mere speculations upon the duties it enjoins. It is sufficient to remark that its proper regulation is of vital importance to the happiness of each individual, as well as to the interests and welfare of society at large, and is one of the first and principal objects of every well-governed political state ; and that, since all are interested in the making of the laws by which it is sanctioned, regulated, and protected, we may well be assured that the common-sense element of natural law, as it relates to this title, will appear in those principles, rules, and legislative enactments, which together make up our positive law.

Of the relation of parent and child, it may also suffice to observe that, although it seems more directly to point to duties and rights which are certain and specific, yet even these will be found to suppose some kind of special agreement

or positive law. Not that nature is silent or indifferent, in view of relations of the highest moral and social significance, but that she speaks in clearer tones and with greater force in the law that expresses the common sense of society at large.

The other relations—those of guardian and ward, and master and servant—are purely conventional. The natural duties and rights of persons in these relations, as well as in those of man and wife, and parent and child, in view of the doctrine already advanced concerning perfect and imperfect rights, we therefore leave to be determined, as they can only be determined, by agreement of the parties themselves.

We might, it is true, if inclined to the method of some of the writers upon natural law, imagine a state of nature—a sort of Utopia—and a code of laws peculiar thereto. But we do not propose to treat mankind as creatures merely of the imagination, inhabiting an imaginary world, and governed by imaginary laws. Possibly, from the principle of natural harmony alone, we might, as metaphysicians, deduce a complete code of ethics, a portion of which would apply in these relations. But if, as seems probable, none but metaphysicians would acknowledge its force or obligation, the necessity of positive agreements and laws, as the only means of determining our perfect duties and rights, in these, as in other relations, would still exist.

The right of one to make law for another can never arise among equals; or, which is the same, in a state of nature, or by natural law. There is, therefore, apart from civil and political laws, no other means of determining our relative duties and rights than private individual legislation, founded in mutual understandings and agreements—a method of legislation proceeding from the natural liberty of each individual, and to which our attention shall now be directed.

OF THE RELATIVE RIGHTS OF LIBERTY.—In what the liberty of each individual consists we have formerly shown. It is the right of self-government, the right of a man to govern himself, in things peculiarly concerning himself, by what his own reason prescribes as reasonable, or by what his own nature assures him is natural; and, in matters

where others with him are equally concerned, by his agreements with them, and the laws prescribed by common consent. And this, we have seen, gives birth to three distinct, though naturally coördinate and coöperative powers—viz.: the power to make rules or adopt regulations relating to one's own individual affairs, the power to judge of their meaning and true application, and the power to enforce them. By the intercourse of men these powers are brought into a social relation, and, if men were perfect beings, the natural effect might be a concurrent and harmonious recognition of their relative duties and rights, a unanimous judgment of the law of their nature, and a faithful execution of the law by each in all his relations to others. But our very first parents, even they who were perfect, could not observe the law of their nature; much less can we, who inherit their nature, and therefore their law, but not their original virtues. The inevitable consequences of individual being are self-insufficiency and insatiable want. Men are in want of everything but themselves. They cannot but envy each other's prosperity and covet each other's possessions. Self-interest prompts them to bad faith; ungoverned passions, to the commission of crimes. But few are willing to submit to just laws; many would rather punish others for the crimes which they themselves commit. Each is ready, without provocation, to indulge unfounded suspicions and avenge imaginary wrongs. Words, strifes, wars, ensue. The victor rules—the vanquished is slain or enslaved.⁴³ Such is human nature. And yet it is possible, perhaps, by a little reflection upon the natural relations of the liberty of individuals, to discover some practical truths which may be of great value in our future investigations.

In a society of equals the powers of government, whatever they may be, must be equally enjoyed by each of the members; the jurisdiction of one must be concurrent with,

⁴³ See Inst. 1, 2, 2; Cooper's Justinian, pp. 410-415; Taylor's Elem. Civ. Law, 429.

not exclusive of, the equal jurisdiction of another. The powers of government must doubtless relate to the making, expounding, and enforcing of laws. Our further consideration of the subject will, therefore, fall under the following heads—viz.: the concurrent legislative powers, the concurrent judicial powers, and the concurrent executive powers of individuals. Hence we examine, first—

The Concurrent Legislative Powers of Individuals.—An almost infinite variety of particular relations between individuals arise from their mutual agreements, compacts, and covenants. And since the principles that naturally govern the making of agreements, compacts, and covenants form an important part of natural jurisprudence, we propose, in this place, to briefly review those principles, and arrive, if possible, at a clear understanding of their true application.

Every man has, as we have seen, an absolute right to form resolutions, or prescribe to himself regulations, for the government of his own individual conduct. On the very same principle, two or more persons have a right to join in a positive agreement, for the proper regulation of their common affairs, and to also bind themselves (by any means which they may see fit) to its faithful observance in their relations with each other; and, though their act be called an agreement, contract, or covenant, yet it is essentially the same in principle, and the same in nature, with every other act of human legislation. It consists of the conjunction and united determination of two or more minds, in relation to some object or subject-matter, and is always intended to have the force of a positive law as between the parties themselves; as between whom it is, in fact, a law of their own making, which they, from being of one mind, have prescribed to themselves as a fixed criterion of their relative duties and rights.

The natural obligation of our agreements with each other is the universal law of our nature, which binds us to observe them, and which, moreover, gives us a right to enforce them. Thus, as Montesquieu says, every particular law is connected with another, or depends upon some other, of a more general

extent.⁴⁴ Just as the universal principle of humanity, the living law of our nature, equally enters into every individual of our race, just so the universal obligation of our nature, the tie that binds us to natural duty, equally enters into every individual agreement, and, indeed, into every individual act.⁴⁵ In other words, those principles of justice, which are relatively general or universal, furnish the natural connecting links, the natural obligations, of those which are more particular or individual; a particular law derives its sanction from a law which is relatively general; and this, again, depends on another which is still more general or relatively universal. The most universal obligation of our nature is that law or principle of our being which establishes our absolute duties and rights as inherent, inalienable, and wholly independent of our action, and binds us to observe them in all our relations with each other. An agreement, therefore, or a particular law, in order to be binding, must be consonant with our absolute duties and rights, or, at least, not repugnant to those articles, which, we may say, are the fundamental principles of the moral constitution of man and of human society. Here, then, we have a criterion by which to judge of the obligation, validity, or binding force of private individual legislation.

But, though we have a criterion by which to judge, yet all men are equal in natural right, and, therefore, all are equally entitled to judge of what is right. Every man has, moreover, an absolute right to act on his judgment, so far as his action concerns his own interests, and does not involve his relations to others. The same holds equally true of two or more persons, whose right to act on their judgment must be the same, and of equal force, so far as their action relates to themselves and not to others. As among those who are equally concerned in a matter, all are entitled to an equal voice. But the parties to an agreement are those, and those

⁴⁴ Preface to his *Spirit of Laws*.

⁴⁵ See Burlamaqui's *Principles of Natural Law*, Part II, c. 7, § 6 *et seq.* "Obligation, in its original idea, is nothing more than a restriction of liberty, produced by reason."

only, who are equally concerned therein—those, and those only, therefore, who are entitled to judge of its obligation, and to carry their judgment into execution. Their agreement, we say, is of no validity or moral effect if it contravene their absolute rights, or the absolute rights of either of them—which rights are inalienable, and wholly independent of any human action—and, therefore, the parties are bound, notwithstanding their positive agreement, to observe those rights in all their relations to each other. This is our judgment. But have we a right, independently of civil and political laws, to act on our own authority and judgment, and prevent the parties from enforcing their agreement as against each other? We certainly have not. They alone are the judges of their law, so far as it relates to themselves—as we alone are the judges of ours, so far as it relates to ourselves. Were we to attempt to enforce our judgment upon them, they might resist, and, with equal right, attempt to enforce their law or agreement upon us. We, therefore, conclude that, whatever the law or agreement which the parties have made for themselves, we are bound to consider it as legitimately resulting from their absolute right of self-government, and as carrying with it inherent obligation, so far as it relates to matters peculiarly affecting them, and not of equally immediate importance to us.

Government among men is not otherwise possible on the basis of peace. Suppose the agreement be, not of a few individuals, but of quite a large number, who thereby form themselves into a political community or state; the agreement would of course be invalid, and the members of the community would be bound to break it, if their absolute rights were violated by it. This is clearly the judgment of natural law—the judgment of humanity itself. But no other community could have any right to pronounce and enforce it. An agreement, then, whatever it be, is always valid and binding as between the parties themselves who have made it, however immoral and void it may be in the judgment of others.

(It follows, from what we have said, that none but the par-

ties themselves can judge of the rights which arise from their agreement; but of this elsewhere.)

Suppose we abandon the law which is written in the hearts of men, as a law which justifies nothing but anarchy and confusion, and hold to a law objectively existing—existing, not in ourselves, but in the mind of a superior being, and prescribed to man as the positive rule of his action. Still, all men are equal in right, are equally entitled to judge of that law, and to join in the making of particular agreements or particular laws, such as the parties themselves shall judge to be valid and binding by virtue of the law prescribed to all. The same conclusions with those we have formerly drawn from the natural equality of men would here again inevitably follow. We cannot ignore the equal jurisdiction of each other without ignoring the only foundation of peace among men, and founding all government in the right of might, or the chance of war.

Having now seen that mankind are free, in their natural state, to bind themselves by agreements, such as the parties immediately concerned shall judge to be proper in their relations with each other, we proceed to consider the essentials of every agreement, without which it cannot arise or possibly exist. And, first, it is doubtless essential to every agreement that the parties be competent to a clear and intelligent understanding of its terms, and of the duties and rights which it aims to determine and define. If they be incompetent to such understanding, there can be no agreement between them, no *aggregatio mentium*, no union or conjunction of minds. It cannot be said that a man assents to what he does not understand. The capacity of persons to bind themselves by agreements, compacts, and covenants is, however, always presumed until negated by proof.

There must, in general, be a definite proposition, and an unqualified acceptance thereof, although the agreement may be, as it always is if the original proposition is not fully accepted, the result of mutual concession and compromise.

The utmost good faith, fidelity to truth, must prevail throughout, and each of the parties must be at full liberty to

act freely in the matter, without any fear or constraint; for no obligation can attach to any agreement, compact, or covenant which is merely formal, procured in bad faith, through violent means, or fear of violence.

In justice to themselves and to each other, the parties should endeavor to avoid all mistakes; for, so long as there is any important mistake or misunderstanding of the subject-matter, or concerning the facts upon which the agreement is based, their agreement is merely an agreement in form, is only apparent, and no obligation arises therefrom.

Supposing the agreement, compact, or covenant to be properly made, upon a clear understanding of the matter to which it relates, and expressed in terms which the parties have chosen as appropriate to their purpose; we are next to consider their rights respecting the interpretation and construction of their act. And this leads us to examine—

The Concurrent Judicial Powers of Individuals.—Respecting his own individual affairs, every man has, as we have formerly seen, an absolute right to judge, and to be himself the exclusive judge, of what is right and of what wrong. This cannot be the case, however, where others with him are equally concerned. Where persons are equally interested, they are equally entitled to judge, and the judgment of one is of no higher authority than that of another. This principle is peculiarly applicable to the agreements of persons wherein they are equally interested as parties; and its proper effect will in nothing more clearly appear than in the interpretation and construction of that original legislation from which all other legislation proceeds.

The exclusive right of the parties agreeing, to judge of the obligation of their agreement, and of the duties and rights arising therefrom, is, as formerly shown, the natural and necessary consequence of the absolute right of self-government. Let us, therefore, enquire what each of the parties may do, by virtue of his right of self-government, in the interpretation and construction of their agreement.

It is difficult to fix any limit to the number of persons that may join together in making an agreement. All who inhabit

a particular locality or country may join together in making a compact, covenant, or fundamental law, and thereby unite in establishing a government for the proper regulation of their common affairs and relations with each other. Or, in the absence of any such authority—that is, in the state of nature—a few individuals may agree in whatever they please. But *two*, at least, must always be necessary to every agreement.

Suppose there be two only. Their agreement presupposes, as its basis, that both were equally competent to make it, and, therefore, are equally competent to judge of the duties and rights it prescribes. Now, either they wholly agree in the interpretation and construction of their agreement—in which case their rights are clearly established; or one demands more, in virtue of that agreement, than the other is willing to concede. If the latter be the case, the rights of the one as against the other become of peculiar importance to the peace of society, and obviously require some delicacy of treatment, even as between themselves. Each is bound, in justice to himself as well as to the other, to apply all the rules of just interpretation and construction, and to judge with that fairness and impartiality which a disinterested and competent judge would naturally exhibit.⁴⁶ He should carefully consider the statements, views, and arguments of the opposite party, and, as both are equal in right, concede to them the weight and importance he attributes to his own. All the available means of an amicable adjustment of their differences both the parties should doubtless employ. If then they cannot agree as between themselves, both being equal in right, and each being bound by his own judgment only, the one may endeavor to enforce, as against the other, the judgment which his own court of conscience has pronounced; or may, perhaps, demand of the other, as a proper preliminary measure, that the differences between them be

⁴⁶ The principles and rules of the Roman civil law concerning interpretation and construction are collected in Wood's *Institutes*, pp. 207–211; and also in Cooper's *Justinian (Notes)*, pp. 587–593. Their justice is acknowledged by all civilized nations, and no student should fail to consult them.

referred to the judgment of another, to be chosen by them from among their acknowledged co-equals, and that both shall submit to the decision of that other as final and conclusive. The parties themselves, exclusively of all others, are clearly entitled to judge of their rights, and each is entitled to act on his judgment. But let us suppose that, out of regard for the peace of society, or having engaged in war till weary of its fruits, they agree to submit to the judgment of another, or of others, and thence appoint us to be judge between them. What, now, are our duties? These are, in brief, to hear and determine. We are to hear the allegations of the parties, and such evidence as they have, concerning their agreement; we are then to determine their duties and rights according to our views of the law and the facts.

If the evidence is full, clear, and uncontradictory, the agreement between the parties is apparent, and we have nothing to do but to apply the law. Suppose, then, it plainly appears that the one has bargained, for a given consideration, to resign his right of self-government, and in all things submit to the will of the other; that the one has received the price of his liberty, as fixed by the agreement, but refused to perform the office of a slave, which he promised to do in return; and that, in defence of his course, he denies the obligation and validity of the agreement. Now, what is the law of our nature as applicable to this case? Are we bound to consider the agreement of the parties as legitimately resulting from their absolute right of self-government, and as carrying with it inherent obligation, so far as it relates to themselves? That we were so bound, prior to the reference to us, is not to be doubted—at least, our authority to judge, and to act on our judgment, did not extend to their affairs. But, since the matter is referred to our judgment, by the voluntary action of the parties, we are bound no longer to regard their views, but only to judge by the law as we understand it.

Now, in our understanding of the law, we pronounce the agreement to be absolutely void, because the right of self-government is naturally incompetent to its own destruction.

it is one of the absolute rights which are inherent and inalienable, wholly independent of any human action; and, therefore, the parties are bound, notwithstanding their agreement, to observe those rights in all their relations with each other. Such an agreement, whatever the consideration or inducement thereto, can impose no rational or moral obligation, can enjoin no duty and confer no right. The moral responsibility of self-government can never be shifted from one to another. As well can a man transfer his personal being—his reason to know, his understanding to judge, and his will to do, what the law of his nature prescribes.⁴⁷

Suppose an agreement of all the proprietors of a given country, by which they establish a common government for the direction of their common affairs, with legislative, judicial, and executive powers; these powers to be exercised subject to the articles of agreement—the constitution—by persons chosen in accordance therewith. This is supposing the institution of political and civil society, which is nothing more than the union of a body of people, who agree to live in subjection to one or more rulers, in order to find, through his or their protection and care, the happiness to which they naturally aspire.⁴⁸ In supposing this, however, I do not mean to direct attention to the nature and structure of civil societies, but only to glance at the rights of the parties to the social compact, by the light of the principles of natural law. Now, who are to judge, in the last resort, of the obligation of the social compact, of the duties and powers of the government on the one hand, and of the parties to the compact

⁴⁷ "There are rights which of themselves have a natural connection with our duties, and are given to man only as means to perform them. To renounce this sort of rights would be, therefore, renouncing our duty, which is never allowed. But with respect to rights that no way concern our duties, the renunciation of them is licit, and only a matter of prudence. * * * Man cannot absolutely, and without any manner of reserve, renounce his liberty; for this would be manifestly throwing himself into a necessity of doing wrong were he so commanded by the person to whom he has made this subjection." Burlamaqui, *Principles of Natural Law*, Part I, c. 7, § 8. All the writers, but those who ground all right in the naked power to command and enforce obedience, are of one and the same opinion concerning this matter.

⁴⁸ Burlamaqui's *Principles of Politic Law*, Part I, c. 2, § 1.

on the other? If, in the last resort, the government is the judge of these matters, its power is virtually absolute, for it has all the power it may judge to belong to itself. Its powers, however, are supposed to be limited by its constitution—that is, by the will of the parties to the compact in which it is founded. It cannot, therefore, judge, in the last resort, of the extent of its powers, or of the rights of the parties to the fundamental compact. These parties, then, who are the authors of the fundamental law, are to judge, in the last resort, not only of the rights and powers reserved to themselves, but also of those conferred on their rulers. I say, in the last resort; for always, in the first instance, the agent must act upon his own understanding of the authority delegated to him. Suppose, then, that in the construction of the organic compact a difference arises between the parties; by what criterion should judgment be given? The relative rights of persons, as formerly shown, are doubtful and imperfect, until determined by some manner of legislation. Their absolute rights, however, are naturally perfect, being inherent, inalienable, beyond the power of the human will, and, therefore, of higher authority than any merely human legislation. These, therefore, must be the criteria of judgment in cases of doubt. For nothing can be valid as against them. The right of self-government, for instance, cannot be affected by human legislation. This, as susceptible of definition, is the right of a man to govern himself, in things peculiarly concerning himself, by what his own reason prescribes as reasonable; and, in matters where others with him are equally concerned, by his agreements with them, and the laws prescribed by common consent. Here we find the natural and necessary boundary-line, beyond which no human legislation can go. Now, human legislation—the original compact of society—is the acknowledged source of political sovereignty.⁴⁵ Political sovereignty, then, the power of the political state, cannot be construed to authorize laws which infringe upon the right of individual self-government.

⁴⁵ Burlamaqui, *Principles of Politic Law*, Part I, c. 6, §§ 2, 6.

It thus appears most evident that all political sovereignty, how absolute soever we suppose it to be, is subject to natural limits; and that, supposing a people to have given to their government an arbitrary and unlimited power, this concession must of itself be void and of no effect. No man can divest himself so far of his liberty as to submit to an arbitrary prince, who is to treat him absolutely according to his fancy. This would be renouncing his own life, which he is not master of; it would be renouncing his duty, which is never permitted; and, if thus it be with regard to an individual who would make himself a slave, much less has a nation that power, which is not to be found in any of its members.⁴⁹

But what proportion of the number of the parties to the social compact may pronounce final judgment upon questions involving its interpretation and construction? In other words, what is a naturally sufficient majority for the decision of matters of common concern? It is doubtless true that, if there be any justice in allowing the decision of the majority to overrule that of the minority, then the greater the majority the greater the justice of their cause, and the more binding their decision. But perhaps the necessity of a decision, in many cases, is of greater importance than the justice of the decision when made. If not, it is difficult to see upon what principle a hundred and one may decide a question against one hundred.

In order to a just disposition of the question propounded, we must carefully distinguish the absolute rights of men from those which arise in their relations to each other; for, as all agree, men have rights which are inherent from their birth, inseparable from their nature, and, therefore, inalienable, and not to be varied or changed by the act of a majority, nor even by the act of all together. It is, therefore, only in matters which involve their relations to each other, and which are of common and equal importance to all, in their

⁴⁹ Burlamaqui, *Principles of Politic Law*, Part I, c. 7 §§ 22-24; *Principles of Natural Law*, Part I, c. 8, § 5; c. 9, § 4.

character of members of society, that the will of all is the law of all. Even in their relations to each other, there are certain fundamentals which cannot be decided while one of their number dissents. And this very question of the number of voices sufficient to determine the will of the whole is one of those very fundamentals. On things fundamental unanimity is obviously essential; while in things which are not fundamental, but dependent on time, place, and surrounding circumstances—or, perhaps, indifferent—unanimity cannot be expected, though the necessity of deciding on these as they arise be equally apparent. Here, then, is another natural and necessary boundary-line, on the one side of which nothing can be done without the consent of all concerned, and on the other side of which a given majority may be authorized to speak for the whole.

It does not appear that reason suggests any rule as to what the majority should be in matters that may not require the concurrence of all. But certain it is that reason denies the power of majorities in things fundamental, as well as concerning the absolute rights. Natural equity requires that whatever affects or concerns all should have the approbation of all.⁵⁰ The question, therefore, what majority may speak for all, must be decided by the fundamental compact itself—that is, by the unanimous consent of all concerned. And then, if all agree that a number less than the whole shall decide, a decision by that number, on matters within their control, must stand as the decision of all.⁵¹

The Concurrent Executive Powers of Individuals.—It has often been remarked that nature invests no one in particular with the right of enforcing her laws. This follows from the fact that no one is naturally clothed with an exclusive jurisdiction, or an exclusive right to say what is right. Every

⁵⁰ This maxim of the Roman civil law is peculiarly applicable here, though not to those assemblies which are constituted for the regulation of public affairs in pursuance of the social compact. See Puffendorf, *L. of N.*, b. 7, § 16. And see, generally, the same chapter, §§ 14-18, on the right of majorities.

⁵¹ See Rutherforth's *Inst. of N. L.* 251, 252.

man is, however, within the sphere of his absolute rights, exclusively entitled to judge of what he may naturally do, and also to act on his judgment in defending those rights. And, where he has made an agreement with another, the terms of which are perfectly clear and obviously just, no doubt can exist of his right to enforce his rights as determined and established by the agreement itself. Originally, indeed, the right to enforce the law arises from the sense of one's duty—the rational conviction that every man ought to exert his power to prevent, redress, and punish infractions of the law of his nature. And, if all men were agreed in their views and opinions of what that law requires, if all could clearly perceive and know what duties it enjoins and what rights it confers, no difficulty or doubt could emerge; none might err in enforcing the law. Since, however, men cannot but differ in all that makes them individuals, a conflict of judgments arises, and strifes and wars ensue; which, seemingly, nothing can avert, so long as they do not possess some certain criterion of their relative rights, in the form of positive constitutions and laws.

The right of a man, or body of men, to forcibly coerce or compel another to perform his agreement, compact, or covenant is clearly a relative and conditional, and not an absolute or unqualified, right. In doubtful cases, no such right can exist. It can only exist where the agreement is so clear and so just that only one judgment thereon can be given—that is, where the duties and rights of the parties are clearly ascertained and defined by the agreement itself, and are, therefore, perfect duties and rights. And even where this is the case, it being impossible for man to foresee into future relations and events, the law of our nature does not suppose that a party will always be able to meet and discharge the obligations he assumes. In nearly all cases, then, some consideration will be due to the question whether the state of things in which an agreement was made or an obligation incurred, and the state of things in which such an agreement or obligation is sought to be enforced, are widely different,

or nearly the same. For the power of a man to bind himself, or incur obligations, is naturally limited to the ability he may have to discharge them. Nor can he in fact incur an obligation which comes into conflict with his absolute duties, or the discharge of which obligation must deprive him of the necessary means of fulfilling those duties. Hence, if the state of things in which his agreements were made have become so materially changed, without any fault of his own, that he can neither so well nor at all perform his engagements to others, he is justly entitled to delay their fulfilment until he be able to discharge them.⁵²

The execution of the law must, as is obvious, follow the judgment. And, the parties concerned being equally entitled to judge, and each being equally right in pursuing the rule of his conscience, no rule which we can lay down will oblige them. As formerly observed, the government of reason and natural right is one of which every individual is the head, and this holds true so long as the relations of liberty are not determined by positive laws.

OF THE RELATIVE RIGHTS OF PROPERTY OR DOMINION.—Some writers suppose that every object of property or dominion originally belonged to all mankind in common; that the world we inhabit; the trees, herbs, and fruit, which the earth produces; the soil itself, from whence they are produced; the inferior animals, such as birds, beasts, and fishes, which supply us with food, or labor for us, or serve for our pleasure, were given to all alike; and Rutherford says that it cannot be conceived that any of them belonged originally to any part of the species, or to any individual exclusive of the rest of mankind.⁵³

The language of Justinian is more intelligible: Wild beasts, birds, fish, and all animals, bred either in the sea, the air, or upon the earth, so soon as they are taken, become, by

⁵² See Puffendorf, L. of N., b. 3, c. 7, § 3.

⁵³ See Rutherford's Institutes of Natural Law, b. 1, c. 3, § 2; Grotius, Jure Belli et Pacis, lib. 2, c. 2, § 2; Puffendorf, L. of N., b. 4, c. 4; Vattel, L. of N., b. 1, §§ 207, 208, and context.

the law of nations, the property of the captor; for natural reason gives to the first occupant that which had no previous owner.⁵⁴

It is doubtless true that humanity itself, if susceptible of laws, obligations, and rights, is entitled by nature to the necessary means of discharging its duties. But humanity exists only in the individuals of our race. Hence it is equally true, and equally conceivable, that every individual has naturally a right to the means of discharging his obligations. The law of nature, as Vattel frequently remarks, imposes no duty without conferring a corresponding right to the means of performing it; and this proposition contains in itself a fundamental principle of natural law, whether we speak of the duty of an individual, of a society of individuals, or of mankind in general. Nor can it be truly said or maintained that every individual of the species has naturally a common and equal right with all other men to each and to every particular thing. A right such as this would be an absurdity. No man could set foot on the earth unless by agreement with all other men. And even then, as the law of nature is of higher obligation than the act of man, the agreement itself would be null and void.

Considered from a rational or moral point of view, the things of this world are merely the means to the discharge of our duties to ourselves and to each other. And nature, supplying an abundance to this end, confers upon every individual an original and perfect right to these means, so far, and so far only, as they become proper and necessary to the performance of his duties, and have not already been appropriated by another to the discharge of his own.

Every man being by nature obliged to preserve his life and his health, he is originally clothed with a corresponding right to such natural means as are necessary to that end. He is equally obliged to exert his powers, to think, to will, and to act; so that, by his knowledge, industry, and art, he may shape and convert the products of nature into means suffi-

⁵⁴ Inst. 2, 1, 12.

cient for the purposes of life. These, therefore, the gifts of nature, so far as appropriated by him to the discharge of his duties, together with the fruits of his knowledge, industry, and art, are his own individual and exclusive property. And it is even more natural to conceive of this exclusive individual property in things than it is to conceive of the equal right of all mankind to every thing in common. For all our rights, whether of life, liberty, or property, rest on one and the same foundation—namely, our duties to ourselves and to each other; all are, therefore, equally susceptible of rational demonstration and defence, and all the more easily distinguished and apprehended from the individual than they are from the general or universal point of view.

Natural things may be divided into such as are, and such as are not, within our power. For of human dominion the power itself, as well as the right, is naturally limited. Such things as are beyond the power of man must of necessity be free from dominion, and, in this sense, remain in common. Things common to mankind by the law of nature are the air, running water, the sea, and the shores of the sea.⁵⁵ To which we may add the light of the sun, and all other things in which no property can possibly be had; also, all things which have never had an owner, or, having been owned, have been abandoned, though capable of ownership.

From the exercise of the original right to such means as are necessary to the performance of our duties arises the just acquisition of property—which acquisition is distinguished as either original or derivative: original, as of title to things which before belonged to no one in particular; derivative, as of the original title of a former owner—the original title remaining the same in itself, but being conveyed by him who held it to his successor—sometimes by the mere operation of the law, sometimes by agreement between them.

Of Original Acquisition.—The original acquisition of things takes place, not only when they are justly taken by the origi-

⁵⁵ Inst. 2, 1, 1.

nal occupant, but also when, upon the failure and extinction of his title, they have ceased to have an owner, and another acquires them by virtue of his own original right. For, however it may happen that a thing is not owned by any in particular, and is, therefore, said to lie open and in common to all, that fact alone must justify any who may need it, in exerting the original right of acquisition in relation thereto. And, therefore, he who acquires the title is said to obtain an original property, as though the thing had never before had an owner.⁵⁶

It is generally agreed that a mere intention to acquire a thing amounts to nothing till clearly evidenced by the fact of possession. And, therefore, nothing but the exclusive occupancy of the thing in question is admitted to invest the claimant with a perfect title by natural law.⁵⁷ Mere occupancy, however, is not to be regarded as giving a title, but only as the evidence of the occupant's intention. For his title can be nothing but his right to the means of discharging his duties. And yet, as prior to his actual possession of the thing, some other might take it for the performance of his duties; so, therefore, it is necessary, in order to the exclusion of others, that he who designs to appropriate a thing, and has a right so to do, should carry his design into actual execution—so far, at least, as to notify others of its appropriation by him.

The reason for an actual occupancy being that all should have evidence of the claimant's design, it follows, of course, that the manner of taking possession must always be such as to evince that design. Thus, in order to establish his title to lands, he ought to enclose them within certain defined limits or bounds, subject them to tillage and improvement, or leave such signs of his actual possession and use of the same as shall notify others of the nature and extent of his claim.⁵⁸ For others will not be excluded by his claim unless

⁵⁶ See Rutherforth's Inst., b. 1, c. 3, § 12.

⁵⁷ *Ibid.* § 8.

⁵⁸ See Puffendorf, L. of N., b. 4, c. 6, § 3.

they have notice of its nature and extent.⁵⁹ To establish a title to movable things, they ought to be taken from the place where found, and so brought within the control, care, and custody of the claimant that others can have no doubt of his design.⁶⁰

From what we have seen, it seems to be requisite, in order to a perfect title by occupancy agreeably to natural law, that the thing which was taken admits of a definite and determinate possession, is also something which had no owner, which one might take without injury to another, and which he actually took as a means of performing his duties.

The title by occupancy, thus understood, extends to the fruits or accessions of a thing⁶¹—such as the increase of animals, the productions of the earth, and the gains and profits arising from use.

If a thing be intentionally abandoned by the owner, so that it again becomes common, then, as we have seen, it lies open and free to the next taker. But, if it be lost, the title of the owner continues the same, and passes not to the finder until after he has vainly endeavored to discover the owner.⁶² The title of the finder is good, however, as against all others but the owner, and, indeed, as against the owner himself, until he has proved his ownership, and offered to pay the expenses of the finder, incurred in the care of the thing.

Of Derivative Acquisition.—A derivative acquisition is said to be made when one man derives a title through another, whether by agreement between them or by mere operation of law.⁶³

The original right of property itself, considered as the right of a man to the necessary means of discharging his

⁵⁹ Rutherford's Inst., b. 1, c. 3, § 8.

⁶⁰ Puff. L. of N., b. 4, c. 6, § 9 *et seq.*

⁶¹ As to which, see Puffendorf's Law of Nature and of Nations, b. 4, c. 7, and Barbeyrac's notes.

⁶² See Puff. L. of N., b. 4, c. 6, §§ 12, 13.

⁶³ See Rutherford's Inst., b. 1, c. 6, § 1.

duties, is doubtless inherent and inalienable. But the right of a man to a particular thing does not exclude the right of another, prior to any act of possession. Some act of possession, either by himself or else by another from whom he derives title, must always intervene before the right can attach to any specific object. Since, then, a man's right to this or that thing in particular has only attached by force of some positive act, he may relinquish a particular property at will, wholly or partially, and in whatever way he deems consistent with his duties to himself and to others.⁶⁴

The right of a person to dispose of his property according to his fancy is generally considered as flowing from the right of property itself. In natural law, however, the rights of a man are never independent of his duties; although, so far as his duties exclusively relate to himself, he himself is the judge of what they require him to do.

In derivative acquisitions by agreement of parties, a design or consent to alienate the thing is necessary on the part of the grantor, and a voluntary acceptance of it is equally necessary on the part of the grantee. The consent of the parties must, moreover, be properly evidenced by words, by actions, or both. For a consent which does not appear can no more fall under the notice of mankind than a consent which does not exist. Clear evidence is always required of a man's consent to part with his property, although his consent to accept a gift, or other advantage, is readily presumed, in the absence of evidence to the contrary.⁶⁵

From one's right to dispose of his property as he pleases, some have argued that he may, by declaring his will in his life-time, control and direct the disposal of it after his death. Their doctrine is that, though the act of the owner in making and declaring his will may have no effect so long as he lives, yet, after his death, the force of such act will survive, and

⁶⁴ Having shown, under a former head, the principle and nature of agreements, it is necessary only to show in this place that property in things is a proper subject-matter of agreements; and not, like liberty or self-government, inalienable.

⁶⁵ See Rutherforth, b. 1, c. 6, § 2.

vest his property in the person or persons named in his will. The reasoning in support of this doctrine is hardly conclusive. From a lesser power a greater is deduced. An act of the will is raised to the dignity of a law, which others must obey when the power that has prescribed it has ceased to exist. This act of the will, moreover, is opposed to the law of inheritance, which, as established by reason and nature, is of higher obligation than the will of any man.

Property in things is derivatively acquired by the mere operation of the law of our nature only in two cases—viz.: where, upon the death of the owner, it passes to his heirs or next of kin; and where, upon the failure of a man to perform his duties toward others, it is taken in just satisfaction of their claims. Which last instance is sufficient to show how insecure all rights of property would be if men could invoke no other protection than the law of their nature. The poor, the suffering, and the needy would often complain that some of their neighbors have more than the necessary means to the performance of their duties; that they fail to discharge the duties of humanity; and thence would proceed to make such reprisals as their real or imaginary wrongs might seem to excuse. (Perhaps the head should think of its debt to the feet.)

If a person has injured us by taking from us what is justly our own, or by holding from us what is justly our due, the law of nature not only allows us to make reprisals, by seizing so much of his goods as is equivalent to what we have been deprived of by his wrongful act, but it also gives us property in the goods so taken.⁶⁶

Another method of acquiring property by the sole operation of law is where, upon the death of a parent, his duties and rights descend to his children by the law of inheritance: for nature herself establishes this with the law of generation. If, indeed, there is any relation of life which is clearly the bearer of natural duties and rights, it is that of parent and child, and nothing can be more agreeable to nature than that

⁶⁶ Rutherforth's Inst. N. L., b. 1, c. 7, § 2.

the means acquired by the parent for the discharge of his duties should, after his death, and when he is no longer able to direct their use, pass to his children, as his natural and immediate representatives, kinsmen, and heirs. It must be admitted, however, that the law of nature is not so clear in all the particulars relating to this head as to wholly exclude the rational necessity of positive legislation.

In conclusion of our brief observations concerning the natural rights of property, it is proper to remark that, subject to certain limitations and restrictions, the right of one to an exclusive property in things may cease to exist, as against another who is compelled to use them, by the extreme necessity to which he is reduced. Thus, if one take victuals not his own—yet it is no theft, if he must otherwise starve; for, though the owner has, in respect of all other men, an exclusive right to the things so taken, he has no such right as against the necessitous person.⁶⁷ To this head, also, we may likewise refer the right we have, in case of a fire, to pull down our neighbor's house to preserve our own; the right we have to cut the cables or nets of another, where our own boat is entangled with them, and must otherwise sink; the obligation of a person on board of a ship at sea, when there is a scarcity of provisions, to bring out his own stock and share it in common with others; the right of all on-board, in case of a storm, to demand that each shall throw his goods into the sea, so far as necessary to relieve the ship; and, in fine, the right of a nation at war with another to seize and garrison a place of strength in a neutral country, when it is morally certain that the enemy would otherwise obtain possession of it, and by that means be enabled to prolong the war or do an irreparable damage.⁶⁸

The right of extreme necessity is, nevertheless, subject to such restrictions as will keep it from being abused, or made an excuse for taking things without sufficient cause. These restrictions are mainly three—viz.: 1. All other methods are

⁶⁷ *Ibid.* b. 1, c. 5, § 6.

⁶⁸ *Ibid.* Grotius, l. 2, c. 3, § 6; Puffendorf, b. 2, c. 6.

first to be tried, if the necessity will allow of time ; such as a request to the owner, or, under the civil laws, an application to the magistrate, before we use the property of another.

2. The right is not to be exercised if the owner is under an equal necessity, for, where the necessity is equal on both sides, the claim of the owner is the better of the two.

3. When we have taken the property of another by virtue of the right of necessity, we are obliged, as soon as able, to make a just satisfaction for it.⁶⁹

OF WRONGS; FIRST, INDIVIDUAL.—Wrongs are merely negations or infractions of rights. And as these are purely individual in their nature and source, and can never be supposed to arise from the universal nature of man, or the principle of humanity itself as one and the same in all men, it follows, of course, that we cannot here make the division of wrongs that we primarily made of rights themselves. Wrongs are not first universal, and then individual by force of our nature. But, arising from the passions and infirmities of their authors—or rather, perhaps, from their habit of neglecting the duties of self-government—they are, first, in their causes and effects, individual and particular; and thence they become, in their general effects, such as in natural law we denominate social, and in positive law, civil, public, or political. We, therefore, here consider wrongs in a twofold light: first, as individual; and, secondly, as social; though whether the one or the other, we are naturally led to enquire concerning, first, their various degrees and kinds; secondly, their prevention; and, thirdly, their redress.

Of the Various Degrees and Kinds of Wrongs, as they Affect Individuals.—It may here be remarked that all infractions of the law of our nature, from the slightest neglect of a relative duty to the grossest violation of an absolute right, are generally denominated wrongs. They are, however, variously distinguished. Some arise from simple omissions; others are caused by force and violence. Invasions of the absolute rights of persons, or their domestic relations, when accom-

⁶⁹ See Rutherford, b. 1, c. 5, § 7; Grotius, l. 2, c. 2, §§ 7, 8, 9.

panied with force, are generally crimes. Breaches of compacts and covenants are, and acts of trespass upon the property of another may be, no more than civil injuries. But, if asked to define a crime—the crime of murder, theft, or any other⁷⁰—we must have recourse to some positive law, by which the ingredients of the offence are clearly ascertained and determined. But the same is also true of civil injuries. Hence, but little can be said of the different degrees and kinds of wrongs as determined solely by natural law—all being equally entitled to judge of the law of their nature, of the duties it enjoins and the rights it confers, and the wrongs or injuries of which they complain, and none being bound by the judgment of another, except so far as it agrees with his own.

Of the Prevention of Wrongs.—The several methods and means of which are mainly reducible to two—viz.: self-defence, and the punishment of aggressors.

1. The right of self-defence is the right of a man to defend his rights against unjust attacks upon them, or to ward off such evils or mischiefs as tend to his hurt.⁷¹ It is not confined to the defence of our persons merely; it extends to all cases wherever we are threatened with a causeless harm, although there be no criminal design on the part of the assailant, or of him who, unless prevented, would be the immediate, though perhaps the innocent, cause of our suffering. For the law of nature no more obliges us to undergo a causeless harm when it arises from an innocent, than when it arises from a malicious, design. Our right of defence is founded, not in the crime of him who attempts to hurt us, but in the obligation imposed by that law to use all necessary means to self-preservation.⁷²

Our right to forcibly resist and repel infractions of the law of our nature is measured by our duty to employ such means as are necessary to prevent them; and hence it follows

⁷⁰ See Rutherford's *Inst. of N. L.*, b. 1, c. 10, § 7.

⁷¹ See Puffendorf's *L. of N.*, b. 2, c. 5.

⁷² Rutherford's *Inst. of N. L.*, b. 1, c. 16, §§ 2-5; Grotius, l. 2, c. 1, §§ 2, 3, *et seq.*

that the true criterion of the force or means to be employed in a given case is the necessity of the force or means in order to defeat the offender's design. If, for instance, he who threatens the evil can be deprived of his liberty, so far as to free us of all apprehensions of danger from him, we can have no right to take his life or do him a bodily harm. The means must be proportioned to the end ; we can, therefore, take no step or measure, as against an offender, the necessity of which is not apparent as a means to our safety and security. If, indeed, we advance beyond the necessity of the case, we ourselves become the aggressors, and close the door to the return of peace.

In civil society the authority of the law and the power of the magistrate, in general, afford the means of defence. And, where the means are available, no one can (according to the principle just laid down) employ any other. The right of defence is the same in the civil as it is in the natural state—the difference being in the means of defence ; and the necessity of a measure, as the only available means of defence, being, in natural as in civil society, its only warrant and justification. Some have imagined the right to be different in civil society from what it is in the natural state ; but their judgments in the matter appear to proceed from a false idea of the measure and limits of the right. The institution of civil society was designed to supply the necessary means of defence to all. It is in itself no more than a means to that end. But it neither destroys the original right in which it is founded, nor proves an all-sufficient means to the end in view. And hence it follows, if the power of the magistrate cannot be invoked, or, being invoked, proves insufficient, we still have the right to defend ourselves as best we can, and to use such means as our judgment approves and necessity warrants ; and the assailant can blame no one but himself for the harm we do him in repelling his causeless attacks, and providing for our further security.⁷³

2. The right to punish offenders—that is, to inflict some

⁷³ See Puffendorf's *L. of N.*, b. 2, c. 5, §§ 5, 6, *et seq.*, and Barbeyrac's note.

evil upon them as a means of preventing the repetition of their offences—is also a consequence of the general duty which we owe to ourselves, and to each other, of taking such measures as are actually necessary to our peace and security.

In order that the laws of our nature, which tend to the peace and preservation of mankind, may be observed, and that no man may offer an injury to his neighbor, nature has given to every individual a right to punish the violation of those laws—which laws, as well as all others imposed upon men, would be altogether useless if, in the free state of nature, no person had a right to enforce them by protecting the innocent and restraining the insolent. But, all mankind being naturally equal, it follows that, if in that state every one has a right to punish the breach of the law of nature, there is no man but has it in as large an extent as another.⁷⁴ It is, therefore, untrue that, unless we are under some particular engagement to help a person that is wronged by another, we are not obliged to oppose the assailant unless he insults us directly. On the contrary, we not only have a right to espouse the quarrel of the injured, but also, according to the laws of humanity, we are rather engaged to defend him, if we find ourselves able to do it.⁷⁵

As between individuals, this right of the one to punish the other for indignities offered or wrongs committed, though an instinct of nature, witnessed by facts of daily occurrence, unquestionably involves a delicate point—whether we consider the right of the one to inflict, or the duty of the other to suffer, the punishment due the offence. The right is naturally limited to the necessary means of preventing wrongs, and can never be invoked as sanctioning means unnecessary to that end. In this respect, it is governed by the principles that govern the right of self-defence. If the force or means employed in self-defence transcend the proper limits of a just defence, then all admit that he who was originally defending his rights becomes the assailant; that the parts of

⁷⁴ *Ibid.* Barbeyrac's note (3) to § 6, quoting Locke on Civil Government, Part II, b. 2, c. 2; b. 8, c. 3, § 4, n. 3.

⁷⁵ Barbeyrac, *ibid.*

the play are exchanged, and the party originally in the wrong has the right on his side. And so it must be in regard to punishment. The actual necessity of a particular measure in order to our peace and security, must clearly appear. If the right to punish to that extent cannot exist. In other words, supposing the right in a given case, the degree of the punishment is naturally determined by the necessity of inflicting it as the only means of preventing the recurrence of the offence.

Of the Redress of Wrongs.—Which redress must be effected in one of two ways—viz.: either by agreement or else by force.

When another has done us an injury or harm which we could not prevent, the right of prevention gives place to the right of redress; in virtue of which, restitution or satisfaction may justly be demanded, and if not freely made, then forcibly obtained. Our duty requires that we seek redress by peaceful means before we attempt to obtain it by force. For a person may happen to do us an injury which he does not intend, and which, when brought to his notice, he will willingly repair. A fellow-being is always entitled to be treated with respect, to the same extent that we claim it for ourselves so long as he gives us no positive evidence of his intention to wrong us. Hence, if he wrongs us, but gives us no positive evidence of his intention to do so, we do him injustice in resorting to force or violent means before we have brought the case to his notice, and given him time to make reparation. And even if, upon coming to know of his fault he refuses to make satisfaction, the means we employ should be proportioned to the redress that is sought. If, for example, we have been unjustly deprived of our property, we have also demanded the possession, and been refused—the possession being the redress that we seek, we may justly proceed to regain it; but if without force we can take it, no force may be used; and, if force be necessary, we can use no more than necessity warrants.

In cases of pecuniary damage, as where property taken cannot be recovered in kind, or where a duty is breached,

engagement broken, if the offender refuses satisfaction, we may seize of his property enough to cover our loss, and convert the same to our use.⁷⁶ In doubtful cases the law of nature gives no right to redress, unless by agreement of the parties concerned. But in a clear case it is unnecessary to consult the offender; the injured party may, consistently with that law, by the use of his strength, or of such force as he may be able to command, endeavor to obtain satisfaction by making reprisals upon him who has done or caused the damage, but only to the value of what he has lost.⁷⁷

In this connection the distinction between perfect and imperfect rights demands particular attention. For the violation of an imperfect right can give no perfect right to demand reparation. Where even the right itself is perfectly clear, and its violation is free from doubt, yet, if the evidence respecting the offender shall be of a doubtful and uncertain character, the right of redress cannot be enforced. When one is in doubt of his duty or right, he is not to act; when certain of his right, and also certain of its violation, but still in doubt of the author, or certain of all these, yet uncertain of the author's intention, he is not to break the peace of nature and prove himself the cause of wrong.

Cases, however, may happen in which a person may believe himself wronged by another, may have carefully considered all the evidence of the facts and the law relating thereto, and have no doubt of the author of the wrong, the design or intention of the act, or the means or measure of redress; in which, moreover, the person charged with being the offender, not only refuses to make satisfaction, but resists the complainant in all his efforts to make reprisals, or obtain redress by any other means. In a case of this kind, what course is the party complainant to pursue? If true to himself, he will hardly submit to injury and oppression. To brook an insult is to merit one. War, then, is the only alternative. Now, the party accused may have acted according to

⁷⁶ See Rutherford's *Inst. of N. L.*, b. 1, c. 7, § 2; Vattel's *L. of N.*, b. 2, § 342.

⁷⁷ Rutherford, *ibid.* c. 17, § 2.

his conscience, and done nothing but what, in his judgment, his duty required. And, neither being bound by the judgment of the other, either will claim to have justice on his side, and do all in his power to maintain his cause.

It is argued, sometimes, that war can never be just on both sides. But, clearly, neither of the parties is bound by the judgment of the other. May the question be settled by neutrals, then, who can never so well know the cause of dispute? In case I decide between you and your enemy, I necessarily side with you or with him; and, to that extent, I make myself a party to the war, and become your friend and his enemy, or your enemy and his friend. In fact, so long as I pretend to be a neutral, or the friend of both parties to the war, I must act as a neutral—must side with neither; and, therefore, my commerce with the one must not prejudice the other. Wherefore, only the belligerents themselves may decide upon the justice or injustice of the war; and, as each will assert the justice of his cause, those who would stand upon neutral ground must look upon both as equally engaged in the defence of their rights, and as equally chargeable with the evils that result.

SECONDLY, OF SOCIAL WRONGS.—By social wrongs, we mean those wrongs which affect society, and not merely the individuals offending and offended.⁷⁸

The least infraction of the law of our nature is clearly a wrong; the greatest is no more than a crime, or a sin. The least may affect only the individual committing it; the greatest may in some manner affect the whole world. Between the least and the greatest it is impossible to define the degrees. But all great wrongs, such as cannot be reme-

⁷⁸ "The distinction is quite arbitrary; that is a civil injury in one system of law which is a crime in another." Austin on Jurisprudence, p. 779. It is founded in the difference between the individual and the society of which he is a member. The act, denominated a wrong, is relative to both the individual and the society, and both have their rights in consequence of the wrong. The distinction is no more arbitrary than that between a man and a society of men. It was always sufficient, however, to invoke Austin's whole power of denunciation, that Blackstone had approved and adopted.

died, we generally call crimes; while wrongs that may be remedied we usually class as civil injuries. Of wrongs, however, the nature, kinds, and degrees are so infinitely varied that little or no profit can be derived from any attempt to determine and define them independently of positive laws. Nor can their prevention or redress be accomplished, or in any way regulated, unless by the institution of the political and civil state. The state of nature, as we have seen, is the state of anarchy.

From all that is advanced, the necessity of the political state is apparent, in order to the security and protection of man in the proper enjoyment and development of his nature, not only as against his own evil passions, his imperfections, and errors, but also as against the vicious and degenerate of his species, whose source of enjoyment is the misery of their fellows.

This necessity, however, is a matter of degree. In proportion as a people are true to the law of their nature, the necessity of the political state is removed, so far as it concerns their relations with each other; for a man who governs himself in accordance with his duty and right of self-government needs not to be governed by others. The necessity of political power arises only from the conduct of those who can not, or will not, govern themselves; and, therefore, in proportion as a people are degenerate and corrupt, the necessity is that of despotic rule. The necessity, of course, must always depend on the people themselves. They may, perhaps, on account of a variety of external causes, partake of every conceivable character—good, bad, and indifferent—as well as of every conceivable color, race, and previous condition, and may, possibly, have carried their development in all these respects, as well as in the arts and sciences, to the highest pitch of refinement. In which case the necessity of the political state will demand a net-work of government exceedingly refined, and a system of positive jurisprudence derived from all others, and supplying a rule for every conceivable relation of man to man and the world.

A review of the foundations of jurisprudence was proposed—not a complete system of ethics, much less a plan for the codification of statistics; and our purpose is fully accomplished if in the least we have aided in unveiling those great, original, and luminous principles which in all ages have moved as a pillar of light before the ark of true civilization.

WM. O. BATEMAN.

II. POWER OF SALE MORTGAGES AND TRUST DEEDS.

Within the short limits of a Review article it is possible to treat of only a few of the questions that have arisen under this new subject of jurisprudence. The present article is confined to the consideration of the following topics:

1. *The Nature and Use of Powers of Sale.*
2. *Statutory Powers of Sale.*
3. *Deeds of Trust.*
4. *The Power of Sale a Cumulative Remedy.*
5. *Revocation or Suspension of the Power.*
6. *When the Exercise of the Power may be Enjoined.*

1. *The Nature and Use of Powers of Sale.*—The delay and expense incident to a foreclosure and sale in equity have brought power of sale mortgages and trust deeds into general favor, both in England and America; and, although their general use is now confined to a part only of our states, the same influences which have led to their adoption and use heretofore are likely to lead to their general use everywhere at an early day. It is true that recent codes and statutes have done something to simplify the remedy, by bill in equity; but, at best, the process of foreclosure by suit is cumbersome and expensive, as compared with the remedy afforded by a power of sale. Preliminary to a bill in equity, or to a petition or suit authorized by codes which adopt a bill in equity as the basis of the proceeding, is an investigation to ascertain who have become interested in the property since the taking of the mortgage. All such parties, sometimes quite numerous, must be made parties to the suit, and must be served with process, else the foreclosure will not be complete. The decree of sale may be rendered only after a

long delay. The sale is made through a sheriff or other officer, who must report his proceedings to the court. Orders must be obtained for the confirmation of the sale, and, perhaps, for the distribution of the proceeds of it. There may also be attendant references to ascertain the amount of the mortgage debt, or to determine whether the property shall be sold together or in separate parcels; or in what order different parcels shall be sold, in consequence of the equities of subsequent purchasers; or, after the sale is made, to determine whether the title is such that the sale can be enforced against the purchaser. It is true that all these proceedings are designed for the protection of the mortgagor and others who may be interested in the property; but, while such protection is occasionally not without its use, in almost all cases the parties interested in the property are equally well protected by the remedy out of court afforded by a power of sale, and, as will be presently noticed, when protection is needed in exceptional cases the court can be effectually appealed to.

A power of sale, whether vested in the creditor himself or in a trustee, affords a prompt and effectual security. Although it may press harder upon the debtor in point of time, it is not without its advantages to him. The delay and expense incident to a foreclosure suit he is obliged to pay for in some way, and it is generally in the way of paying a higher rate of interest for the loan. It is probably safe to say that, in its practical operation, the power of sale is not used to oppress or injure the debtor more frequently than the process of foreclosure by suit. Undoubtedly some prejudice against this form of security still remains. More especially this is the case where it is little used, and where capital is scarce, and the difficulty of obtaining large sums without delay is a serious one. But both the fancied and real objections to powers of sale in mortgages and trust deeds are likely soon to give way under the real advantages they afford to both the debtor and the creditor, and the general adoption, to the exclusion of other forms of security upon real property, may be looked for at an early day.

In some of the early cases, both in England and America, the validity of powers of sale in mortgages was much questioned. The case of *Croft v. Powel*¹ was for a considerable time considered an authority against mortgages of this description, although, in fact, their validity was not involved in the decision. This was a mortgage made by a deed and separate defeasance, which provided that, if the loan was not paid within the time agreed, then the mortgagee should mortgage or absolutely sell the same lands, free from redemption, and out of the money raised by such mortgage or sale pay the loan and interest, and be accountable for the surplus to the mortgagor and his heirs. The money not being paid at the time, the mortgagee agreed to convey the estate to a third person, and in the agreement and conveyance an exception was made, and the defeasance was mentioned. For this reason it was considered that it was not the intention of the mortgagee to give the purchaser an absolute and indefeasible estate, for it was not conveyed to him absolutely and free from the equity of redemption, but subject to the defeasance.

When Mr. Powell wrote his *Treatise on Mortgages*, he considered the validity of powers of sale "of too doubtful a complexion to be relied upon as the source of an irredeemable title."² Even so late as 1825, although such powers had been sustained in the few cases in which they had been the subject of adjudications during the early part of the present century,³ Lord Eldon, then Chancellor of England, while not denying the validity of a mortgage in this form, strongly objected to it, saying: "Here the mortgagee is himself made the trustee. It would have been more prudent for him not to have taken upon himself that character. But it is too much to say that, if the one party has so much confidence in the other as to accede to such an arrangement, this court is, for that reason, to impeach the transaction. It is next provided that, if the mortgagor shall make default in paying the sums stated, at the appointed time, the mortgagee may make

¹ 2 Comyn, 603 (1738).

² 1 Powell on Mort. 19.

³ *Clay v. Sharpe* (Mar. 1802), reported in *Sugden's Vendor's Appeals*, No. 14; *Corder v. Morgan*, 18 Ves. 344 (Nov. 1811).

sale and absolutely dispose of the premises conveyed to him. This is an extremely strong clause ; but perhaps it may be one of the many new improvements in conveyancing, which make conveyancing so different from what it was when I had any practice in that part of law." Here he enquired of Mr. Sugden how the practice was in that respect ; Mr. Sugden admitted that the clause was usually inserted in deeds like the present. Lord Eldon : " How can it be right that such a clause should be introduced into a deed under which the party is a trustee for himself ? Then there is a clause that it shall not be necessary for the purchaser to enquire whether a sale was proper, etc. Here, too, it must be recollected that this is a clause to be acted upon, not by a middle person, who is to do his duty between the *cestuis que trust* ; but the mortgagee is himself made trustee to do all those acts. Upon the whole, I must say that this deed seems to me of a very extraordinary kind, and that there are clauses in it upon which it would be very difficult to induce a court of equity to act." It seems, however, that his observations were made without deliberation, and were not called for in the case before him.⁴ By general accord, power of sale mortgages were about this time adopted into general use in England, and they have always been fully sustained and approved.⁵ At the present time every mortgage has a power of sale, for, when not inserted in the deed, as is usually the case, a power of sale is supplied by statute. The powers usually inserted in mortgages are much more complete, and give a much more speedy remedy, after a default, than this statute power, so that it is now the general understanding that there must be a power of sale, else the money is hardly obtainable upon the mortgage. So universal is this practice that it is now held, contrary to the opinion formerly entertained,⁶ that trustees, under a direction in a will to raise money by mortgage, are

⁴ Roberts v. Bozon, Chan. (Feb. 1825) M. B., cited in Coventry's Prec. Mort., p. 150 ; 1 Powell's Mort. (Am. ed.) 9, a note.

⁵ Matthie v. Edwards, 2 Coll. 465 ; Anon., 6 Madd. 15 ; Saloway v. Strawbridge, 35 Eng. Law & Eq. 447 ; 1 Jur. (N. S.) 1194.

⁶ Sanders v. Richards, 2 Coll. 568 ; Clark v. Royal Panopticon, 4 Drew. 26 (1857).

authorized to give the mortgagee a power of sale in case of default in repayment of the money or the interest of it. In a recent case,⁷ Sir R. Malins, V.-C., said: "I am of opinion that a power of sale is a necessary incident to a mortgage, and that when a testator says that a sum of money is to be raised by mortgage, he means it to be raised in the way in which money is ordinarily raised by mortgage, and, therefore, that the mortgage may contain what mortgages in general do contain—namely, a power of sale." This is further illustrated by another case where a mortgage was made by a deposit of title deeds, with a written agreement by the mortgagor "to execute a mortgage" when called upon to do so.⁸ He then sold and conveyed the estate subject to the mortgage; and afterwards executed a power of sale mortgage to his mortgagee, who subsequently sold the estate under the power. It was held that the purchaser was bound by the power of sale; the master of rolls saying "the mortgage very properly contains a power of sale."

It is not possible to say when powers of sale in mortgages were first used in this country; but it appears from a statute enacted in New York in the year 1774 that they were already in use at that time.⁹ The provisions of that statute were reenacted in the first revision of the statutes of that state, in 1788; and, under various modifications, they have been continued to the present day. In Massachusetts, in 1826, Chief Justice Parker¹⁰ said that a power to sell, exe-

⁷ *In re Crawler's Will*, L. R., 8 Eq. 569 (1869). To same effect see *Bridges v. Longman*, 24 Beav. 27; *Selby v. Cooling*, 23 Beav. 418; *Russell v. Plaice*, 18 Beav. 21; *Cook v. Dawson*, 29 Beav. 123, 128; *Earl Vane v. Rigden*, L. R., 5 Ch. 663; *Cruikshank v. Duffin*, L. R., 13 Eq. 555, 560.

⁸ *Leigh v. Lloyd*, 35 Beav. 455.

⁹ Act of March 19, 1774. From this statute it appears that doubts were then entertained whether sales under powers by the mere act of the person to whom the power was granted would extinguish the equity of redemption. After reciting the inconvenience of allowing them to be impaired, it declares that the rights of *bona fide* purchasers shall not be defeated. See, also, as to the early use of powers of sale in New York, *Bergen v. Bennett*, 1 Caines' Cas. 1, 3; *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Slee v. Manhattan Co.*, 1 Paige, 48, 69; *Lawrence v. Farmers' Loan and Trust Co.*, 3 Kern. 200.

¹⁰ *In Eaton v. Whiting*, 3 Pick. 484.

cuted to one who relies upon such power, and expects and intends to purchase an absolute estate, would, without doubt, pass an unconditional estate to the purchaser; yet he says "this form of conveyance is rare in this country;" and he cites the case of *Croft v. Powel*,¹¹ decided almost 100 years before, to the effect that, if the purchaser knows the original nature of the transaction, and appears not to have purchased wholly without reference to the conditional character of the title, he will be compelled, in equity, to surrender it on receiving the money he has advanced.

In some early cases it had been contended that the power of sale so altered the character of the conveyance as to deprive it of the qualities of a mortgage;¹² but in *Eaton v. Whiting* it was said that without doubt the power, while unexecuted, left the estate as it would have been if no power had been given.

Fifty years ago power of sale mortgages were not in general use anywhere in this country; and although considerable use was made of them at an earlier time than any corresponding use was made of them in England,¹³ they were adopted in the latter country at an earlier date than here, to the exclusion of other forms of security. Within the past half century, however, the use of them has rapidly extended, so that in some states the use of any other form is exceptional. The validity of these powers of sale is everywhere recognized, and the use of them, either in mortgages or trust deeds, is becoming general.¹⁴

The use of power of sale mortgages, however, has not yet become so universal here as to lead to their being regarded generally as a necessary incident of a mortgage. In New

¹¹ 2 Comyn, 603 (1738).

¹² *Taylor v. Chowning*, 3 Leigh, 654; *Turner v. Bouchell*, 3 Har. & J. 99.

¹³ In *Jackson v. Henry*, 10 Johns. 185, 196 (1813, a case upon a power of sale mortgage), Chief Justice Kent remarked: "There is no case precisely like this in the English books, because these powers are not in use in Great Britain."

¹⁴ *Turner v. Johnson*, 10 Ohio, 204; *Brisbane v. Stoughton*, 17 Ohio, 482; *Hyman v. Devereaux*, 63 N. C. 624, 628; *Mitchell v. Bogan*, 11 Rich. 688; *Longwith v. Butler*, 8 Ill. 32; *Lydston v. Powell*, 101 Mass. 77; *Kinsley v. Ames*, 2 Met. 29.

York, as early as 1823, Chancellor Kent decided that a power of attorney to execute a mortgage authorized the making of it with a power of sale, because such a power was then one of the customary and lawful remedies given to a mortgagee; that it had become an incident to the power to mortgage, and was of course included under the authority to mortgage, unless specially excluded.¹⁵ If elsewhere the usage has become so established as to warrant a similar declaration, the question has not since been presented to the courts for judicial determination. In Massachusetts, where the use of this form is now more nearly universal, probably, than in any other part of the country, it was held, in 1858, that a stipulation "to give a mortgage" was complied with by giving a mortgage without a power of sale; and that a power of sale was not then a usual accompaniment of a mortgage.¹⁶ Since that time, however, there can be no doubt that a power of sale has become, not merely a usual accompaniment of a mortgage, but almost an invariable one; and it may be anticipated that, when the occasion arises, the court will hold, as have the courts in England, that a power of sale is a necessary incident to a mortgage.

Although in several states a mortgage is by statute or judicial interpretation declared to be a mere security for the payment of a debt,¹⁷ and not a conveyance of the legal title, yet this view of the nature of the security does not in any way interfere with, or impair, the doctrine of powers to sell.

2. *Statutory Powers of Sale.*—In England a mortgage is now considered incomplete without a power of sale, although since Lord Cranworth's act,¹⁸ in 1860, all mortgages are in effect made power of sale mortgages; for this act provides

¹⁵ *Wilson v. Troup*, 7 Johns. Ch. 25.

¹⁶ *Capron v. Attleborough Bank*, 11 Gray, 492. See, also, *Platt v. McClure*, 3 Woodb. & M. 151.

¹⁷ *Calloway v. People's Bank of Bellefontaine*, 54 Ga. 441, 449.

¹⁸ 23 & 24 Vict. c. 145. In a subsequent statute, 25 & 26 Vict. c. 53, a power of sale, intended to operate under the foregoing statute, is given in a form of mortgage annexed to the act, as follows: "C D shall have power to sell, on default of payment of the principal or interest, or any part thereof, respectively."

that, where money is secured by a deed of land or of any interest in it, the person to whom the money for the time being is payable shall—at any time after the expiration of one year from the time when the principal shall have become payable, or after any interest shall have been in arrears for six months, or after any omission to pay any premium or any insurance which ought to be paid by the person entitled to property—have, to the same extent as if conferred by the mortgagor, first, a power to sell the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make; second, a power to insure from loss by fire, and to add the premiums to the debt secured at the same rate of interest; third, a power to appoint, or obtain the appointment of, a receiver of the rents and profits. No such sale can be made until after six months' notice, in writing, given to the person, or one of the persons, entitled to the property, or affixed on some conspicuous part of the property. The purchaser's title is not liable to be impeached on the ground that no case had arisen to authorize the exercise of such power, or that no notice had been given; but any person damnified by an unauthorized sale has his remedy in damages against the person selling. The person selling makes a deed to the purchaser, and gives a receipt for the money, which fully discharges him. The purchase-money is applied to the payment of the expenses of the sale, the interest and principal of the debt, and the surplus goes to the person entitled to the property sold. The act also contains provisions for the appointment, when necessary, of a receiver, whose duties it declares. It makes every mortgage executed after the passing of the act a power of sale mortgage, unless the application of the act is expressly negatived by the deed itself.

One object of the statutory power of sale enacted in England was to shorten the mortgage deed used in that country, but in this respect the statute has wholly failed. It has been of use in some few cases in which the mortgage deed contained no power of sale. The chief cause of the

failure of the statute has been that it was not liberal enough in its provisions. A more expeditious mode of obtaining the money out of the mortgaged property is almost universally demanded, so that a special power of sale is nearly always inserted in the deed. It has been suggested that the failure of the statute is due in part to the intense caution and deep-rooted conservatism which is always¹⁹ found among conveyancers.

The general object of this statute cannot be too highly commended; and it is to be hoped that statutes in similar form, but more liberally framed, may be enacted in this country. A power provided by statute, while it would prevent the cumbering of the records with the elaborate provisions in common use for enforcing the security, would make securities more certain, and therefore more valuable to both parties; for the construction of such a power would soon be settled, and settled for the whole community. Some protection might be afforded the mortgagor at the same time; but too much legislation in this respect would be much worse than none at all; for the efficacy and simplicity of this remedy might be easily destroyed. Even now, in a few states, the exercise of the power is so restricted and hedged about with provisions in regard to notice, the conduct of the sale, and redemption afterwards, that this remedy is only a little better than the cumbersome process by suit in equity.

The only states in which a statutory power of sale has been provided are Virginia and West Virginia. The statute is the same in both states, the latter state having adopted the statute of the former. This statute applies to trust deeds only, as this form of security has in those states wholly superseded the use of mortgages. It provides for the sale of the property by the trustee whenever, after default, the creditor may require it, and for the application of the pro-

¹⁹ Another suggestion, which would not be repeated except that it rests on English authority, is that the fact that deeds are charged for according to their length may have something to do with the failure—not only of this, but of other attempts—to shorten papers used in conveyancing.

ceeds to the payment of the debt and the compensation of the trustee; and the surplus to the debtor. In its brevity and simplicity this statute is to be commended.

3. *Deeds of Trust*.—A deed of trust to secure a debt is, in legal effect, a mortgage.²⁰ It is a conveyance made to a person other than the creditor, conditioned to be void if the debt be paid at a certain time; but, if not paid, that the grantee may sell the land and apply the proceeds to the extinguishment of the debt, and pay over the surplus to the grantor. The addition of the power of sale does not change the character of the instrument any more than it does when contained in a mortgage.²¹ Such a deed has all the essential elements of a mortgage; it is a conveyance of land as security for a debt. It passes the legal title to the grantee just as a mortgage does, except in those states where the natural effect of a conveyance is controlled by statute; and in those states, as a general rule, it is considered merely as a security, and not a conveyance—just as a mortgage is considered.²² Both instruments convey a defeasible title only; and the right to redeem is the same in one case as it is in the other. The only important difference between them is that in the one case the conveyance is directly to the creditor, while in the other it is to a third person for his benefit.

To the same effect Mr. Justice Walker, in a recent case before the supreme court of Arkansas, said: ²³ "The attributes of a deed of trust for such purposes, and a mortgage with power of sale, are the same; both are intended as securities, and, in a legal sense, are mortgages; in both, the legal title passes from the grantor; but in equity he is, before foreclosure, considered the actual owner in both, and as broadly

²⁰ Woodruff v. Robb, 19 Ohio, 212; Sargent v. Howe, 21 Ill. 148; Newman v. Samuels, 17 Iowa, 528, 535; Lawrence v. Farmers', etc., Trust Co., 13 N. Y. 200; Palmer v. Gurnsey, 7 Wend. 248.

²¹ Eaton v. Whiting, 3 Pick. 484; Newman v. Samuels, *supra*; Corpman v. Baccastow, Sup. Ct. of Penn., 1877, 5 N. Y. Weekly Dig. 204.

²² Lenox v. Reed, 12 Kan. 223, 227.

²³ Turner v. Watkins, 31 Ark. 429, 437.

in one as the other; the grantor has the right to redeem, in other words the equity of redemption, which can only be barred by a valid execution of the power."

It has already been noticed that Lord Eldon thought it quite objectionable that a mortgagee should himself be made the trustee to sell under the power. But Mr. Coventry, after quoting his remarks, expresses his own preference for a mortgage with a power of sale in the mortgagee. He thinks the intervention of a trustee is in all cases a serious inconvenience; and that, even if he does not become hostile to the creditor, he may, by his inexperience or squeamishness, subject him to much trouble; and he recommends that the mortgagee retain in his own hands absolute power over his own property. The objections to the intervention of a trustee are apt to come from the mortgagee, and he is generally in position to have his own choice in the matter. The mortgagor is apt to suppose that, in placing the exercise of the power in the hands of a disinterested third party, whose position in relation to it is merely that of a trustee, he secures for himself the protection of fair dealing. It generally happens, however, that the debtor has to pay for the services of a trustee, whose disinterestedness is no more than that of the creditor himself. The trustee is obliged to act when the creditor secured by the deed has a legal right to call for the exercise of the power, and, if he neglects or refuses to act, he may be compelled to do so, or to give up the trust. The trustee may, when in doubt about his duty, apply to the court in equity to direct him.

This form of security has come into very general use in several states, and in Virginia and West Virginia, in particular, has come into universal use in securing debts upon real estate.²⁴ In a recent case in the former state, Mr. Justice Rives, in the course of an able opinion holding unconstitutional, as applied to trust deeds, a law staying the collection of debts for a limited period, spoke of the nature

²⁴ So also in Missouri.—[ED. S. L. R.]

and use of this security:²⁵ "What is a deed of trust? It is a form of security which has, in our practice, superseded the mortgage, and doubtless for the very reason that it does not require the intervention of the courts. The introduction of trustees, as impartial agents of the creditor and debtor, admits of a convenient, cheap, and speedy execution of the trust, and involves none of the expenses and delays attendant upon mortgages.

"At an early period it met with some resistance from the court and the bar, though feeble and ineffectual. It was deprecated as an engine of oppression in the hands of the creditor. It was denounced as a pocket-judgment. * * * It is now a favorite security for the payment of money, closely interwoven with the transactions of business, and firmly established by the practice of the country and the sanction of the courts. It has, doubtless, aided credit, facilitated the collection of debts, and saved to the debtor the costs of legal proceedings."

4. *The Power of Sale a Cumulative Remedy.*—A power of sale in a mortgage does not generally affect the right to foreclose in equity, either by a strict foreclosure²⁶ or by a judicial sale;²⁷ or to foreclose in any way provided by statute for the ordinary foreclosure of mortgages, as by entry and possession, or by suit. The power is merely a cumulative remedy. It is one species of foreclosure; but it does not exclude jurisdiction in equity. The option, however, to proceed in equity lies wholly with the mortgagee. A resort to a court of equity is not necessary, except where made so by statute; it can be effectually exercised without the aid of the courts.²⁸ Even after the filing of a bill in equity to fore-

²⁵ Taylor v. Stearns, 18 Gratt. 244, 278 (1868).

²⁶ Wayne v. Hanham, 9 Hare, 62; 20 L. J. 530; Slade v. Rigg, 3 Hare, 35.

²⁷ Hutton v. Sealy, 4 Jur. (N. S.) 450; McGowan v. Branch Bank of Mobile, 7 Ala. 823; Marriot v. Givens, 8 Ala. 694; Corradine v. O'Connor, 21 Ala. 573; Wolford v. Board of Police of Holmes County, 44 Miss. 579; Fagarty v. Sawyer, 17 Cal. 589; Coomerias v. Genella, 22 Cal. 116; Atwater v. Kinman, Harr. (Mich.) 255.

²⁸ Hyde v. Warren, 46 Miss. 13.

close such a mortgage, and while the bill is pending, a sale may be made under the power.²⁹ A resort to proceedings in equity is more frequent under deeds of trust than with mortgages. The creditor may sometimes be compelled to do this in order to control the adverse action of the trustee; and a trustee may sometimes do so in order to obtain the direction of the court as to his duties.

When a trustee under a trust deed enters into a collusive arrangement with the grantor in the deed and declines to execute the trust, and, after instituting an action of ejectment to recover possession of the premises, dismisses it against the wish of the beneficiary, a foreclosure may be had in chancery, and a receiver may be appointed upon showing the inadequacy of the security for the payment of the debt.³⁰

Upon the death of the trustee named in a deed of trust, a court of equity has power to appoint a new trustee to execute the power of sale, and to determine the amount of the debt secured by the trust; but a sale by such trustee, professedly by virtue of the trust deed made in pursuance of such decree, is not a sale made under a decree of foreclosure, but one made by virtue of the power in the trust deed.³¹ It has been held in Virginia that such trustee cannot sell until the amount of the debt secured is ascertained; and that either party in interest may resort to a court of equity for this purpose. After ascertaining the amount the court may, in its discretion, dismiss the bill and leave the trustee to sell under the power, or may retain the case and have the trust executed under its own supervision. The court may also appoint a commissioner to make the sale instead of the trustee; but he must pursue the provisions of the deed as to the terms and mode of sale. The court cannot set aside the deed of trust in any respect.³²

If the amount secured by the mortgage can be ascertained by calculation, there is no objection to a foreclosure under

²⁹ *Brisbane v. Stoughton*, 17 Ohio, 482.

³⁰ *Myers v. Estell*, 48 Miss. 372.

³¹ *Rice v. Brown*, 77 Ill. 549.

³² *Crenshaw v. Seigfried*, 24 Gratt. 272.

the power;³³ neither is there if it is conditioned for the **delivery** of certain specified articles, where a specified sum is authorized to be **retained** from the proceeds upon a breach of the condition.³⁴ It is then **equivalent** to a mortgage to secure the payment of a definite sum. But a mortgage given to secure and cover unliquidated damages cannot be foreclosed in this manner³⁵ until the amount due under the mortgage has been ascertained. It has been held, also, that under a deed of trust, if the amount of the debt secured be unliquidated and uncertain, a sale cannot be made under the power until the amount of the debt has first been determined in a court of equity.³⁶

5. *Revocation or Suspension of the Power.*—A power of sale, being coupled with an interest in the estate, cannot be revoked or suspended by the mortgagor. Neither does his death affect the right to exercise the power. Of course, after his death the power cannot be exercised in his name, but the authority to execute it in the name of the grantee continues. The execution of the power is the grantee's act by virtue of the power. It is not a mere power of attorney.³⁷ In Texas, however, although the general principle is recognized that such a power cannot be revoked, yet the exercise of it is regarded as inconsistent with the statutes respecting the settlement of the estates of deceased persons, which require liens upon their property to be enforced in the probate court. Therefore the power cannot be exercised upon

³³ Mowry v. Sanborn, 62 Barb. 223.

³⁴ Lockwood v. Turner, 7 Wend. 458.

³⁵ Ferguson v. Kimball, 3 Barb. Ch. 616.

³⁶ Wilkins v. Gordon, 11 Leigh, 547.

³⁷ Wright v. Rose, S. & St. 323; Conder v. Morgan, 18 Ves. 344; Hunt v. Rousmanier, 8 Wheat. 174; 2 Mason, 244; Connors v. Holland, 113 Mass. 50; Varnum v. McServe, 8 Allen, 158; Bergen v. Bennett, 1 Caines' Cas. 1; Strother v. Law, 54 Ill. 413; Collins v. Hopkins, 7 Iowa, 463; Berry v. Skinner, 30 Md. 567; Bell v. Twilight, 2 Fost. 500; Bradley v. Chester Valley R. R. Co., 36 Pa. St. 141, 151; Hyde v. Warren, 46 Miss. 13, 29; Beattie v. Butler, 21 Mo. 313; De Jarnette v. De Giverville, 56 Mo. 440, 448. The rule is the same in those states where a mortgage is regarded as a mere security, the legal title remaining in the mortgagor. Calloway v. People's Bank of Bellefontaine, 54 Geo. 441 (1875).

the death of the mortgagor, or of the grantor in a deed of trust; or of a purchaser from either, while holding the equity of redemption.³⁸

The insanity of the mortgagor cannot, of course, have any greater effect in revoking or suspending the power of sale than his death would have.³⁹ Neither does an application by a guardian or committee of a lunatic for an order to sell the mortgaged premises for the benefit of his creditors have any effect to deprive the mortgagee of this summary means of realizing his claim.⁴⁰ Of course, if the mortgagee, or any one else, takes an unjust and improper advantage of such condition of the mortgagor, this will be ground for setting aside the sale.⁴¹

Neither does the bankruptcy of the mortgagor affect the mortgagee's authority to execute the power, either in the mortgagor's name and as his attorney, or in the mortgagee's own name; for the assignee takes subject to the rights of the mortgagee.⁴²

A conveyance by the mortgagee of a part of the premises is no waiver of the right to sell under the power. A mortgagee, under a mistaken belief that he was the absolute owner of the property, having conveyed a part of it by deed with covenants of warranty, was held, nevertheless, to possess the right to foreclose the mortgage under a power of sale, because his conveyance did not amount to an assignment of the mortgage, and the purchaser took the title subject to the mortgage.⁴³ If he himself should become the purchaser under the power of sale, he would be estopped to claim, as against his grantee under his deed of warranty, the land so conveyed by him. A conveyance in the same way of the whole estate would doubt-

³⁸ Robertson v. Paul, 16 Texas, 472; Buchanan v. Monroe, 22 Texas, 537.

³⁹ Encking v. Simmons, 28 Wis. 272.

⁴⁰ Berry v. Skinner, 30 Md. 567; Davis v. Lane, 10 N. H. 156.

⁴¹ Encking v. Simmons, *supra*.

⁴² Hall v. Bliss, 118 Mass. 554; Dixon v. Ewart, 3 Meriv. 322; Story on Ag. § 482.

⁴³ Wilson v. Troup, 2 Cow. 195.

less be held to be an assignment of the mortgage, which would carry with it the power. Neither does a mortgagee waive his right to sell by an entry to foreclose, and the taking of rents and profits insufficient to pay the debt.⁴⁴ The power to sell, in general, continues so long as the debt remains unpaid.

The pendency of a bill to redeem by a subsequent encumbrancer does not, it would seem, suspend the power to sell; ⁴⁵ for in this way the very object of the power, which is to afford a speedy remedy without the delay of a suit, would be defeated. The encumbrancer may protect himself by purchasing at the sale, or by enforcing his claim upon the surplus proceeds of the sale, when his title can be fully investigated without keeping the mortgage creditor waiting for his money. But, when the first mortgagee has refused a tender of the amount due on his mortgage from a subsequent mortgagee, who has thereupon brought a suit to redeem, the first mortgagee may be restrained from assigning his mortgage and from selling it until a hearing of the case upon the bill to redeem.⁴⁶

In Massachusetts it is held that a tender of the amount due and payable upon a mortgage, after breach of the condition and before the sale, does not defeat the right to sell under the power, because the right to sell attaches at once, and, as it is a power coupled with an interest, it cannot be revoked. The tender is merely the foundation for a suit in equity for redemption. A sale under the power, after a tender made and not accepted, transfers the legal title and possession; but the mortgagor may preserve his right to redeem against a purchaser by giving him notice of the tender before or at the sale. Until he is restored to the legal right of possession by decree of a court in equity, he can neither maintain nor defend a writ of entry against one claiming under the mortgage. The foreclosure is completed by the sale, notwithstanding the tender; and, unless the mort-

⁴⁴ *Montague v. Dawes*, 12 Allen, 397.

⁴⁵ *Adams v. Scott*, 7 W. R. 213.

⁴⁶ *Rhodes v. Buckland*, 16 Beav. 212.

gagor proceeds in equity to redeem, the purchaser is entitled to possession, and may recover it by a writ of entry, although he purchased with full knowledge that, after breach and before sale, the mortgagor tendered the whole amount due under the mortgage.⁴⁷ If, however, a tender be made at the time stipulated in the condition of the mortgage, the right to sell is thereby defeated, and a sale afterwards would be void.

In New York, however, it is held that a tender of the amount due on a mortgage, even after a breach of the condition, discharges the lien of the mortgage, just as a tender at the day does under the common law;⁴⁸ and, therefore, if a tender be made at any time before a sale under the power be actually made, even after the property has been put up at public auction, the mortgagee is bound to stop the sale. If the mortgagee refuses the tender and goes on with the sale, the purchaser having knowledge of these circumstances, the court, instead of leaving the mortgagor to his remedy by bill to redeem, will set aside the sale. But a tender, or even a payment in full, of the debt, so long as the mortgage remains undischarged of record, does not prevent the making of a valid sale under the power to one who purchases in good faith, without knowledge of the payment or tender.⁴⁹

In Missouri it has been held that, where it is provided in a deed of trust that upon any default the whole amount of principal and interest shall be due forthwith, and the trustee may thereupon sell, the debtor is in equity entitled to have the proceedings for sale stopped upon a tender to the trustee, before sale, of the amount due, together with costs accrued; and, if the trustee proceeds nevertheless to sell, the sale may be set aside.⁵⁰

⁴⁷ *Cranston v. Crane*, 97 Mass. 459; *Montague v. Dawes*, 12 Allen, 397.

⁴⁸ *Burnett v. Denniston*, 5 Johns. Ch. 35; *Cameron v. Irwin*, 5 Hill, 272, 276.

⁴⁹ *Elliot v. Wood*, 53 Barb. 285; *Warner v. Beakeman*, 36 *Ibid.* 501, affirmed, 4 Keyes, 487; *Brown v. Cherry*, 38 How. Pr. 352; 56 Barb. 635. For English cases on the effect of a tender see *Jenkins v. Jones*, 2 Gif. 99; *Whitworth v. Rhodes*, 20 L. J. (N. S.) 105.

⁵⁰ *Whelan v. Reilley*, 61 Mo. 565.

The right to exercise a power of sale is not suspended by reason that the mortgagor or owner of the equity of redemption is within the lines of an enemy at war with his own country, especially if he has voluntarily absented himself from home and become an alien enemy. The publication of a notice of sale is in such case binding and effectual. The Supreme Court of the United States⁵¹ say that, when a party has voluntarily left his country for the purpose of engaging in hostilities against it, "he cannot be permitted to complain of legal proceedings against him as an absentee, on the ground of his inability to return or to hold communication with the place where the proceedings are conducted." The same court had previously held otherwise in a case where it appeared that the owner of the property had been driven away from his home, at Memphis, by a military order, and the proceedings to foreclose the mortgage upon his property took place during his enforced absence.⁵² Moreover, a power of sale in a mortgage or trust deed, being coupled with an interest, and irrevocable, may be executed at any time after the happening of the contingency for which it was provided, without regard to the circumstances or disabilities of the mortgagor, or of the owner of the property mortgaged. Immediately upon the happening of that contingency it is the legal and moral right of the creditor to have the power of sale, made for his benefit, exercised. The notice of sale required by the power is not for the benefit of the grantor, in the sense of a notice to him of the sale of the land; for, if that were the case, he could altogether defeat any sale by going to a place where the notice could not reach him. But it is intended rather to notify the community that

⁵¹ *Ludlow v. Ramsey*, 11 Wall. 581. A like decision was made in *Dorsey v. Dorsey*, 30 Md. 522; but in *Johnson v. Robertson*, 34 Md. 165, the court overruled its former decision, doubtless through a mistaken view of the decision of the Supreme Court of the United States in *Dean v. Nelson*: the decision in *Ludlow v. Ramsey* not having appeared at that time. See also *Harper v. Ely*, 56 Ill. 179; *Willard v. Baggs*, *Ibid.* 163; *Mixer v. Sibley*, 5 Ill. 61; *Seymour v. Bailey*, 66 Ill. 288; *Thomas v. Mahone*, 9 Bush, 111; *Crutcher v. Hord*, 4 *Ibid.* 360.

⁵² *Dean v. Nelson*, 10 Wall. 158.

the sale will take place. The grantor must be presumed to know that he is in default, and his property liable to be sold. In a recent case before the Supreme Court of the United States, with reference to a sale under a trust deed, Mr. Justice Miller said :⁵³ "The obligation which the trustee had assumed on a condition had become absolute by the presence of that condition. If the complainant had been dead, the sale would not have been void for that reason. * * * If he had been in Japan, it would have been no legal reason for delay. * * * The enforced absence of the complainant—if it be conceded that it was enforced—does not, in our judgment, afford a sufficient reason for arresting his agent and the agent of the creditor in performing a duty which both of them imposed on him before the war began." And in a case in Missouri,⁵⁴ Judge Wagner, to like effect, said : "So far as the authority of the trustee was concerned to go on and make a sale of the property in satisfaction of the debt, it made no difference whether the grantors were in the Confederate States or in the jungles of India, or even if they were dead."

6. *When the Exercise of the Power may be Enjoined.*—The purpose for which the power of sale is given being to afford an additional and more speedy remedy for the recovery of the debt, the mortgagor is by his contract bound to exercise the necessary promptness in fulfilling it, and cannot complain of a legitimate exercise of the power. "Such a power as this," says Lord Chancellor Cottenham, "may, no doubt, be used for purposes of oppression ; but, when conferred, it must be remembered that it is so by a bargain between one party and another, and it is for the party who borrows to consider whether he is not giving too large a power to him with whom he is dealing."⁵⁵ If in any case it is attempted to pervert the power from its legitimate purpose, and to use it for the purpose of oppressing the debtor, or of enabling

⁵³ *Washington University v. Finch*, 1 C. L. J. 66 ; s. c., 18 Wall. 106.

⁵⁴ *De Jarnette v. De Giverville*, 56 Mo. 440.

⁵⁵ *Jones v. Matthie*, 11 Jur. 504.

the creditor to acquire the property himself, a court of equity will enjoin the sale, or will set it aside after it is made.⁵⁶

"Wherever a power is given," says Sir J. Stuart, V.-C., "the court requires that the power shall be exercised with a view only to that which is the legitimate purpose for effecting which the power was conferred. The legitimate purpose for which the power to sell in this defendant's mortgage deed was given was to secure to him repayment of his mortgage money. If he uses the power to sell, which he gets for that purpose, for another purpose, from any ill motive, to effect means and purposes of his own, or to serve the purposes of other individuals, the court considers that to be what it calls a fraud in the exercise of the power, because it is using the power for purposes foreign to the legitimate purpose for which it was intended.⁵⁷ Of course, so long as the creditor exercises only his legal right, although this be contrary to the wishes and interest of the mortgagor, the court will not interfere to enjoin a sale;⁵⁸ and, as will be noticed presently more at length, a stronger case must be made out to call for such interference than to set it aside afterwards.

It frequently happens that the holder of a mortgage with a power of sale is requested by the mortgagor, or some other party in interest, to exercise it for the purpose of effecting a sale of the property; as when the title subsequent to the mortgage has become complicated by attachments, judgments, or other liens, so that it is not practicable to obtain releases from all persons having claims upon it; or where a sale, except under the power, has become impracticable because the subsequent liens upon it are greater than the value of the property. Sometimes, under these or like circumstances, a default is designedly permitted in order to make the power exercisable, and to cut off subsequent encum-

⁵⁶ *Davy v. Durrant*, 1 De G. & J. 535; *Robertson v. Norris*, 1 Gif. 421; *Jenkins v. Jones*, 2 *Ibid.* 99; *Whitworth v. Rhodes*, 20 L. J. (N. S.) 105; *Close v. Phipps*, 7 M. & G. 586.

⁵⁷ *Robertson v. Norris*, 4 Jur. (N. S.) 155; *s. c.* affirmed, *Ibid.* 443.

⁵⁸ *Jones v. Mattheie*, *supra*.

branches. Doubts are sometimes expressed about the validity of sales made on such request, or with the knowledge on the part of the mortgagee that the purpose is to get rid of a subsequent lien; but it is conceived that, if the power is fairly exercised according to its terms, there is no impropriety in the arrangement. Certainly there is no such objection as to give occasion for the interference of the court to restrain the sale, or to set it aside. "A man taking that which belongs to him, by means of the security which he has contracted for, does not act improperly in so doing, merely because one principal reason for his calling in the money is a wish to benefit another person. The case, however, might be different if it were part of the arrangement that the mortgage debt should be again lent to the purchaser.⁵⁹ So long as the mortgagee is clearly within the authority given by the power, an intended sale will not be restrained, although the exercise of it be harsh and improvident. The grounds for interference by injunction must be very strong, and must show that the injury likely to be sustained by the parties interested will be irreparable, or that a clear breach of trust will be committed by the intended sale.⁶⁰

Where a mortgagee held two mortgages, with powers of sale, upon the same property, the subsequent mortgage, however, being of an undivided interest, and he threatened to foreclose under the first mortgage unless both mortgages should be paid, upon the filing of a bill to redeem from the first mortgage, and the payment of the money due upon it into court, he was enjoined from selling under that mortgage; because the power in that mortgage only existed for the purpose of securing that money, and the mortgagee could not be allowed to proceed under that power in order to have an advantage in obtaining the money due on the second mortgage.⁶¹

Courts of equity will interfere by injunction to prevent a

⁵⁹ Dart's Vendors and Purchasers, 5th ed. p. 75.

⁶⁰ Kershaw v. Kalow, 1 Jur. (N. S.) 974; Bedell v. McClellan, 11 How. Pr. 172.

⁶¹ Whitworth v. Rhodes, 20 L. J. (N. S.) 105.

sale under a power in a mortgage or trust deed where, by reason of fraud, want of consideration, or otherwise, the collection of the debt would be against conscience, and the sale would work a great and irreparable injury.⁶² To warrant this interference the complainant must allege specifically the grounds on which he bases his application; general statements and inferences from facts are not sufficient. An allegation that he does not owe it is not sufficient to warrant the relief.⁶³ A statement that the proposed sale will materially embarrass and injure the petitioner is only a conclusion of his own, and of no consequence unless the facts are stated from which the court can determine what the injury will be.⁶⁴

The court will enjoin a sale only when the petitioner's rights are clear, or free from reasonable doubt. He must show, also, a good reason for asking the interference of the court. He must show that the mortgagee is about to proceed in an improper or oppressive manner, and not merely that he might adopt a different remedy.⁶⁵

The person asking the injunction is not ordinarily entitled to the consideration of the court unless he tenders payment of the amount justly due under the mortgage.⁶⁶

In general, a stronger case must be presented to the court to obtain an injunction against a proposed sale under the power than to obtain a decree setting it aside after it is made.⁶⁷

Undoubtedly a sale under the power may be enjoined when it appears that the mortgage was void in its inception on account of fraud. The bill in such case must clearly disclose the fraud, and the proof clearly substantiate it. Where a mortgage by a corporation was of doubtful validity

⁶² *Montgomery v. McEwen*, 9 Minn. 103.

⁶³ *Foster v. Reynolds*, 38 Mo. 553.

⁶⁴ *Montgomery v. McEwen*, 9 Minn. 103.

⁶⁵ *Bedell v. McClellan*, 11 How. Pr. 172.

⁶⁶ *Sloan v. Coolbaugh*, 10 Iowa, 31; *Mysenburg v. Schlieper*, 46 Mo. 200; *Powell v. Hopkins*, 38 Md. 1; *Vechte v. Brownell*, 8 Paige, 212.

⁶⁷ *Kershaw v. Kalow*, 1 Jur. (N. S.) 974.

on account of being made to the directors themselves on their own vote, a sale was restrained until a hearing of the case.⁶⁸

There may also be an injunction against the execution of the power by reason of circumstances arising after the making of the mortgage, by reason of which the execution of it would be inequitable; but the court will not interfere in such cases except upon strong reasons.⁶⁹ The fact that part of the principal of the debt has been paid does not warrant an injunction against the sale, unless it be in restraint of selling more than enough to pay the amount due.⁷⁰

It is no ground for enjoining a sale under a trust deed that the notes secured reserve usurious interest or include it, except in those states where usury renders the contract void. The trustee's duty to sell, and to apply the proceeds in discharge of the debt legally due, remains the same. If he should attempt to misapply the proceeds and pay what was not legally due on account of usury, the court would then interfere.⁷¹ Usury does not invalidate the mortgage or the power of sale, and the sale will not be enjoined by reason of it unless the debtor bring into court the principal and the legal interest due.⁷² Neither is it a ground for enjoining a sale under a power that the mortgagee, in his notice, claims a greater amount than was actually and legally due.⁷³ In New York, however, where usury renders void the contract, a power of sale in a usurious mortgage is considered void, and

⁶⁸ *Southampton Boat Co. v. Mantz*, 12 W. R. 330.

⁶⁹ *Per* Greene, C. J., in *Frieze v. Chapin*, 2 R. I. 429, 432.

⁷⁰ *Powell v. Hopkins*, 38 Md. 1.

⁷¹ *Tooke v. Newman*, 75 Ill. 215. In Iowa it seems that an injunction would be allowed in such case upon tender of the amount due, less the usurious interest. *Casady v. Basler*, 11 Iowa, 242. And so in Maryland. *Walker v. Cockey*, 38 Md. 75.

⁷² *Powell v. Hopkins*, 38 Md. 1; *Walker v. Cockey*, 38 *Ibid.* 75; *Casady v. Basler*, 11 Iowa, 242.

⁷³ *Armstrong v. Sanford*, 7 Minn. 49. The rule is different in Iowa, where, apparently, an injunction would be granted upon a tender of the amount justly due. *Stringham v. Brown*, 7 Iowa, 33; *Sloan v. Coolbaugh*, 10 Iowa, 31.

a sale under it may be restrained.⁷⁴ If a sale be actually made to one having no notice of the usury, it will be upheld,⁷⁵ but one having such notice would not by such sale acquire any title.⁷⁶

It has been said, however, that, where a mortgage and note contain a penalty of a high rate of interest after maturity—such in amount that a court in equity would give relief against it as unconscionable—the proper course is to obtain an injunction restraining a sale under the power until the amount actually due can be ascertained; because, if a sale is allowed to be had under the power, the mortgagee may retain the full amount of the debt and penalty, and the mortgagor cannot recover back any part of it by action at law. The contract is not in itself illegal, and the only relief against is upon equitable considerations.⁷⁷

The power of sale generally stipulates that it shall be exercised only after giving notice by advertisement for a certain time in some newspaper, or after giving some other prescribed notice. In several states the notice to be given is prescribed by statute, and in such case the statute must be followed, whatever may be the provisions of the power in this respect. In either case a sale made without the proper prescribed notice is invalid; but ordinarily the courts will not interfere to restrain a sale about to be made without such notice. The purchaser is bound to know what the requirements of the deed or of the statute are in this respect, and to see that they have been complied with;⁷⁸ and the

⁷⁴ Hyland v. Stafford, 10 Barb. 558; Burnet v. Denniston, 5 Johns. Ch. 35, 41.

⁷⁵ Jackson v. Henry, 10 Johns. 185.

⁷⁶ Jackson v. Dominick, 14 Johns. 435.

⁷⁷ Bidwell v. Whitney, 4 Minn. 76; Culbertson v. Lennore, 4 *Ibid.* 51; Banker v. Brent, 4 *Ibid.* 521.

⁷⁸ Anon., Madd. & Gel. 10. A provision in the power that the purchaser shall not be bound to enquire into the existence of notice does not protect him against his actual knowledge that there was no notice. Parkinson v. Hanbury, 1 D. & Sm. 143; 2 De G. J. & S. 450. See, also, Ford v. Heeley, 3 Jur. (N. S.) 1116; Forster v. Hoggart, 15 Q. B. 155.

mortgagor and the others interested in the equity may redeem all the same if the power is illegally exercised. Even under the English statute, which provides that the purchaser shall not be affected by the absence of such notice, and that the mortgagor may have remedy by an action for damages, or under a power with like provisions, the court of chancery has no jurisdiction to restrain a sale of which no notice has been given.⁷⁹

Neither will a sale under a power be enjoined in order that the mortgagor may be enabled to set off a balance which may be found in his favor upon unliquidated claims in controversy between him and the mortgagee;⁸⁰ nor to enable the mortgagor to prosecute a bill to correct an alleged error in the amount of the mortgage.⁸¹

It is no ground for suspending a sale that the several owners of the equity of redemption are at variance as to the proportions which they shall contribute for the redemption of the mortgage, though the court may, upon payment into court of a sum sufficient to indemnify the mortgagee against loss, grant a reasonable postponement.⁸²

In an early case in New York a sale was enjoined on an application in behalf of an infant heir of the mortgagor, the amount due upon the mortgage being in dispute.⁸³ The court, however, did not seem to consider that the case afforded any equitable ground for interference, further than to subject the sale to some restrictions; and perhaps make these restrictions only because the defendant consented to them. These were that the amount due should be computed by a master, who should be associated with the mortgagee in making the sale, and that a further notice of the sale should be given, and that only so much of the land should be sold as the master should deem sufficient, in case a part could be

⁷⁹ *Prichard v. Wilson*, 10 Jur. (N. S.) 330.

⁸⁰ *Frieze v. Chapin*, 2 R. I. 429; and see *Robertson v. Hogsheads*, 3 Leigh, 667; *Koger v. Kane*, 5 *Ibid.* 606.

⁸¹ *Outtrin v. Graves*, 1 Barb. Ch. 40.

⁸² *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65.

⁸³ *Van Bergen v. Demorest*, 4 Johns. Ch. 37.

sold without prejudice. In another case in that state a sale was enjoined when the mortgagee claimed in his notice a larger amount than was actually due.⁸⁴ At the present day a court of equity would not, it is conceived, interfere in like cases.

A sale was enjoined upon the application of one who purchased from the mortgagor subject to a mortgage made on the same day and not recorded, because the purchaser was ignorant of the existence of a power of sale contained in the mortgage, and supposed it was in the common form and would require three years' possession under it to effect a foreclosure. He was allowed, however, only time to raise the money, and not the three years in which to redeem.⁸⁵ It is conceived that, in those parts of the country in which power of sale mortgages are now the usual and common form, an injunction would not now be granted on like grounds.

The fact that the sale, if made, would, in the apprehension of the petitioner, result in clouding his title is not such a threatened injury that an injunction should be granted to restrain it.⁸⁶ If the mortgagee should attempt to sell property not included in the mortgage,⁸⁷ or an interest greater than the mortgage conveyed to him, the sale would be of no effect as regards such property or interest, and would not really cloud the title to it.⁸⁸

The insolvency of the trustee in a deed of trust is no ground for restraining a sale of the property upon the application of the grantor, unless it is shown that there is danger that the trustee will misapply the moneys arising from the sale.⁸⁹

The fact that, at the time of the proposed sale under a

⁸⁴ *Cole v. Savage*, Clarke Ch. 361.

⁸⁵ *Platte v. McClure*, 3 Woodb. & M. 151.

⁸⁶ *Armstrong v. Sanford*, 7 Minn. 49, *per* Atwater, J.

⁸⁷ *Montgomery v. McEwen*, 9 Minn. 103. But see *Hubbard v. Jasinski*, 46 Ill. 160.

⁸⁸ *Armstrong v. Sanford*, *supra*.

⁸⁹ *Tooke v. Newman*, 75 Ill. 215, *per* Walker, C. J. "Insolvency, or the want of large capital, by no means implies a want of integrity or business capacity. He may have these in the highest degree, and yet be poor."

mortgage or trust deed, money is scarce, and that the terms of sale require a large cash payment, is no ground for an injunction;⁹⁰ nor is the fact that there is a general depression in business, and the weather inclement at the season of the year at the proposed sale.⁹¹

Instead of enjoining a sale, where there is apprehension of an oppressive or improper exercise of it, a referee or master may be associated with the mortgagee for the purpose of ensuring a fair sale, or a sale of only enough of the premises to satisfy the mortgage debt.⁹²

Besides these remedies by restraining or setting aside a sale improperly made, in case a mortgagor is obliged to pay a sum not properly chargeable to him in order to prevent the sale of his property under the power, he may recover back the money so paid, in a suit at law; as, for instance, where a mortgagee would not stop a sale unless the mortgagor would pay an extortionate sum for expenses then incurred in the proceedings to sell, and the mortgagor paid the amount under protest.⁹³

When wrongfully enjoined, the mortgagee is not only entitled to the usual taxable costs and counsel fees, but also, where the sale does not yield enough to satisfy the debt, to interest on it while the collection of it was suspended, and to the value of the emblements removed by the owner in the meantime.⁹⁴

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⁹⁰ Muller v. Bayley, 21 Gratt. 521.

⁹¹ Caperton v. Landcraft, 3 W. Va. 540.

⁹² See Van Bergen v. Demorest, 4 Johns. Ch. 37.

⁹³ Close v. Phipps, 7 M. & G. 586, *per* Tindal, C. J. "The money was obtained by what the law would call *duress*; as the plaintiff was obliged either to pay it or to suffer her estate to be sold, and incur the expense and risk of a bill in equity." And see Vechte v. Brownell, 8 Paige, 212.

⁹⁴ Aldrich v. Reynolds, 1 Barb. Ch. 613.

III. MASTER'S LIABILITY TO SERVANT.¹

The law of master and servant has been recently the subject of careful and protracted examination by a committee of the English House of Commons. A master, such is the way in which the law is stated, is not liable to his servants for such injuries received by the latter as are incidental to the service; and the reason ordinarily advanced for this conclusion is that, as servants contract with their master to take the risks of their service, they cannot recover from their master damages which they have virtually agreed to release. It is not surprising that the public mind of England, whose population is largely made up of operatives in mills and other enterprises in which defective machinery is productive of terrible risks, should have been agitated by the reason for the proposition, if not by the proposition itself. Of the myriads affected by this proposition (exempting masters, as it on its face does, from a large portion of their liabilities), probably not more than one out of a thousand has any idea of entering into any contract of the character imputed. Over the "fellow-servant" who inflicts the injury the injured servant has in very few cases such a power of supervision as should bring with it responsibility. Hence it was that political economists and politicians, as well as lawyers, heard with much satisfaction that a committee was appointed by the House of Commons, on Mr. Lowe's motion, Mr. Lowe himself being chairman, to report whether the condition of the law in this relation required any legislation.

The result is not very satisfactory. From Mr. Lowe, indeed, we have a very able paper, deploring the law as it now stands. "The law," so he says, "is that the plate-layer

¹ The writer reserves the right of republishing extracts from the within.

on a railway is the fellow-servant of the station-master; that the servants of a contractor are the fellow-servants of the workmen of the person for whom the contractor is at work; in fact, that every person employed by a master is the fellow-servant of every other person." That this relationship of fellow-service existed, and that the parties entering into it, whatever it may have been, agreed that they should not sue the master for their common negligence, is a pure fiction, as Mr. Lowe argues, of the judges. "The contract," he says, "which the judges have assumed to be entered into by every operative, involving, as it does, the cession of most important rights without any consideration, is utterly unknown to the person to be bound by it, and was, to its fullest extent, unknown to the judges themselves." The conclusion Mr. Lowe styles "an extraordinary stretch of judicial legislation," which is to be regarded "with the utmost jealousy and dissatisfaction," altering the common law, "not in any abstruse or remote point, but in a matter which most nearly concerns the interests of hundreds of thousands of her majesty's subjects." From these strong expressions, however, a majority of the committee dissent, citing with apparent approval Chief Baron Pollock's statement that the rule in *Priestly v. Fowler* introduced no new law, and maintaining that, when the offending servant is really a fellow-servant of the person injured, then the master should not be held liable. The following important qualification of the law, however, was recommended by the committee as a body:

"12. Your committee are of opinion that in cases such as these—that is, where the actual employers cannot personally discharge the duties of masters, or where they deliberately abdicate their functions and delegate them to agents—the acts or defaults of the agents, who thus discharge the duties and fulfil the functions of masters, should be considered as the personal acts or defaults of the principals and employers, and should impose the same liability on such principals and employers as they would have been subject to had they been acting personally in the conduct of their business, notwithstanding that such agents are technically in

the employment of the principals. The fact of such a delegation of authority would have to be established in each case, but this would not be a matter of difficulty.

"13. Your committee are further of opinion that the doctrine of common employment has been carried too far, when workmen employed by a contractor, and workmen employed by a person or company who has employed such contractor, are considered as being in the same common employment. Such cases do not come within the limits of the policy on which the law has been justified in paragraph 9 of this report."

As it is likely that the report of which we have given an abstract will lead to further legislative action in this country as well as in England, the following observations may not be now out of place.

The case of an operative, or other servant, who is injured when in his master's employ, and who sues his master for redress, may assume one of the following aspects:

1. The injury may be attributable to *casus*, or one of those extraordinary natural incidents for which human agency is not responsible;
2. Or, it may be attributable exclusively to the interposition of a responsible third person;
3. Or, it may be attributable to the operative's own negligence;
4. Or, it may be attributable to the master's direct personal negligence;
5. Or, it may be attributable to his negligence in the use of defective machinery;
6. Or, it may be attributable to the negligence of fellow-servants of the sufferer.

The first three hypotheses we may throw out of consideration, as they preclude, in any view, recovery against the master. The fourth would sustain a recovery irrespective of all distinctions based on employment. The fifth and sixth may be considered together, for the reason that a servant, so far as concerns his relations to third parties, is considered as part of a machine worked by the master. He may,

so far as concerns his master, be a very wayward or perverse instrument. He may do injuries to third persons in direct contradiction of his master's orders. But, so far as he does these negligent injuries within the orbit of his employment, his master is as much liable for them as for injuries produced by defects in crank or wheel attributable to the master's personal negligence.

Three reasons are offered for the limitation which relieves the master from liability where one servant sues for the injuries received through the negligence of a fellow-servant in the common employment.

First, it is said that a servant, entering into a common employment with fellow-servants, contracts to bear injuries sustained through their negligence without having recourse to the employer. But, even if we concede that every employé is a person capable of binding himself by contract, what is the form that the supposed contract assumes? Do I, as a servant, contract to bear negligences "gross" as well as "slight?" Even as to this important distinction the authorities asserting a contract do not agree; some declaring that such contracts do not avail in cases of "gross" negligence, whatever that may be. Are negligences from whose consequences the master is sheltered simply the negligences of servants in the same workshop as myself, and are we to consider as "fellow-servants," in the sense before us, the 10,000 co-employés of one of our colossal corporations, one of whose servants I may happen to be? Here again the authorities give no decisive instruction. A contract is an agreement to do a particular thing. But here there is no particular thing contracted to be done. We may therefore adopt, in this connection, the following striking statements in Mr. Lowe's report:

"Lord Justice Bramwell remarks 'that the expression which has been used, that a servant contracts that he will make no claim against the master for injury done by the negligence of a fellow-servant, is an unfortunate one. The obvious difficulty in that mode of expressing it is that neither master nor servant ever think of such a matter when

they enter into the relation of master and servant.' Justice Brett says (question 1919): 'I say now that the law is that you cannot properly import any condition or stipulation into a contract, except one which in the minds of all reasonable men must have been in the contemplation and intention of both parties to the contract at the time it was made.' "

A second essential constituent of such a contract is that it should have been entered into with the master, who, when sued, undertakes to avail himself of its exemptions. It is easy to conceive of a contract of this class. If I go to B and A employs me as an operative, there being half a dozen workmen under his control in the shop where I take service then there might be some show for saying that I make a contract with A that I will bear the risks of the negligence of B, C, and D, who form the fellow-workmen whom I am at the time inspect. But there are certain lines of cases to which this exemption is applied in which the employee exempted is not the person with whom the operative contracts. The person whom I sue may not be the person with whom I took service; and this is the case with a conspicuous English authority, *Wigget v. Fox*, 11 Ex. 832; as to which Pollock, B., in 1877 (*Swainson v. Northeastern Railway Company*, 37 L. T. [N. S.] 104), remarked, "there was clearly no contract between the man who was killed and the contractors, Fox and Henderson." To a contract privity is essential; but A, an employer, is not privy to a contract of service made between B and C, and, if A is liable to C, it is not on such a contract. Another case of the same class is suggested by Pollock, B., in *Swainson v. Northeastern Railway Company*. "Take the case," he says, "of two persons, A and B, agreeing to work a mine together, each of them agreeing to contribute and pay the wages of five men. The ten men go down to work, and, in the course of their common occupation, one of A's five men is injured by the negligence of one of B's men. Could he recover against B?" And this the learned judge virtually denies; declaring at the same time that A and B are not in common "the masters of both sets of men." Here we have another

instance of an operative precluded from recovering from an employer with whom he has made no contract of service."

In *Woodley v. Railway Company*, 36 L. T. (N. S.) 419, which was determined by the English high court of appeal in February, 1877, the plaintiff was employed by a contractor engaged by the defendants in excavating a tunnel. Trains, run by the servants of the defendants, were constantly passing the spot, which was on a curve where there was no light. The plaintiff was injured by a train which approached rapidly without any notice of its approach, although guards had previously been stationed on the road for the purpose of giving notice. The jury found that the omission of this precaution was negligence on part of the defendants. The judge trying the case was not dissatisfied with the verdict, and judgment was entered upon it by the exchequer division. This judgment was reversed in the high court of appeal, though under circumstances which divest the judgment of authoritative weight. By Cockburn, C. J., it was conceded that negligence, under the verdict, was imputable to the defendants, but that the plaintiff, by continuing in the employment to which he knew this specific risk was attachable, could not recover. His opinion, however, starts with the remarkable assumption that the plaintiff was the servant of the defendants, though there is a cautious avoidance of any intimation that this was a contract of service in which the plaintiff undertook to bear risks in question: "*If*," so reads the judgment of Cockburn, C. J., "*the plaintiff, in doing the work on the railway, is to be looked upon as the servant of the company*, the decision of the exchequer division in his favor cannot, as it seems to me, be upheld. It could not be said that any deception was practised on the plaintiff as to the degree of danger to which he would be exposed. He must be taken to have been aware of the nature and character of the work, and its attendant risk, when he entered into the employ of the contractor for the job in question; or, at all events, he must have become fully aware of it as soon as he began to work. If he had been misled in supposing that precautionary measures, such as the dangerous nature of the

service rendered reasonably necessary, would be taken, he had a right to throw up his engagement, and to decline to go on with the work; and such would have been his proper course. But, with a full knowledge of the danger, he continued in the employment, and had been working in the tunnel for a fortnight when the accident happened. A man who enters upon a necessarily dangerous employment with his eyes open, takes it with its accompanying risks. On the other hand, if the danger is concealed from him, and an accident happens before he becomes aware of it; or, if he is led to expect, or may reasonably expect, that proper precautions will be adopted by the employer to prevent or lessen the danger, and, from the want of such precautions, an accident happens to him before he has become aware of their absence, he may hold the employer liable. If he becomes aware of the danger which has been concealed from him, and which he had not the means of becoming acquainted with before he entered on the employment, or of the necessary means to prevent mischief, his proper course is to quit the employment. If he continues in it, he is in the same position as though he had accepted it with a full knowledge of its danger in the first instance. He must be taken to waive his right to call upon the employer to do what is necessary for his protection, or, in the alternative, to quit the service. If he continues to take the benefit of the employment, he must take it subject to its disadvantages. He cannot put on the employer terms to which he has now full notice that the employer never intended to bind himself. It is competent to an employer, at least so far as civil consequences are concerned, to invite persons to work for him under circumstances of danger caused or aggravated by want of due precautions on the part of the employer. If a man chooses to accept the employment, or to continue in it, with a knowledge of the danger, he must abide the consequences, so far as any claim to compensation against the employer is concerned. Morally speaking, those who employ men on dangerous work, without doing all in their power to obviate the danger, are highly reprehensible, as I

certainly think the company were in the present instance. The workman, who depends on his employment for the bread of himself and his family, is thus tempted to incur risks to which, as a matter of humanity, he ought not to be exposed. But, looking at the matter in a legal point of view, if a man, for the sake of the employment, takes it, or continues in it, with a knowledge of its risks, he must trust to himself to keep clear of injury. But it may be said the plaintiff was not in the service of the defendants at all; he was on their premises, not only in lawful business, but, it may be said, by their invitation, as he was working under a contractor employed by them to do the work in question; he sustained the injury complained of through what the jury have found to have been negligence on the part of the company; he is, therefore, entitled to damages. But this reasoning appears to me to be fallacious. That which would be negligence in a company, with reference to the state of their premises or the manner of conducting their business, so as to give a right to compensation for an injury resulting therefrom to a stranger lawfully resorting to their premises in ignorance of the existence of the danger, will give no such right to one who, being aware of the danger, voluntarily encounters it, and fails to take the extra care necessary for avoiding it. The same observation arises as before. With full knowledge of the manner in which the traffic was carried on, and of the danger attendant on it, the plaintiff thought proper to remain in the employment. No doubt he thought that, by the exercise of extra vigilance and care on his part, the danger might be avoided; by a want of particular care in depositing one of his tools he exposed himself to the danger, and, unfortunately, suffered from it. He cannot, I think, make the company liable for injury arising from danger to which he voluntarily exposed himself. The contractor, the immediate employer of the plaintiff, undertook to execute work which he knew would be attended with danger in the service under which it was to be executed. The plaintiff, as his servant, did the same. They are in a very different position from that in which they would have stood had they been at work

on the defendants' premises in ignorance of the danger. The conclusion, therefore, at which I have arrived—I must say, with much regret, as I think the conduct of the defendants open to great reprehension—is that the judgment of the exchequer division is wrong and must be reversed.”

Mellor, J., voted for reversal, giving, first, the reason that, notwithstanding the verdict of the jury, there was no evidence fixing negligence on the defendants; but sliding from this to the same assumption as was made by Cockburn, C. J., that the plaintiff was the defendants' servant; and that in the particular case, if the plaintiff saw any peculiar danger in his position, “he ought either to have stipulated with his master, *or the company*” (but, if the company was not his master, how could he be supposed to have a contract with the company?), “to provide some additional means or precautions against such possible danger.” * * * With Mellor, J., Grove, J., agreed. On the other hand, Mellish, L. J., and Baggalay, J., dissented, on the ground (1) that the plaintiff had made no contract of service with the defendant; and (2) that, the plaintiff being on the defendants' premises with the latter's invitation, “there was a duty imposed by law on the company either to avert the danger, or to give the plaintiff reasonable notice of it so that he might protect himself.” The idea of a contract in such a case as the present was emphatically repelled. “The servant of the contractor,” said Mellish, L. J., “enters into no such contract with the railway company at all, and his contract with his own master is *res inter alias acta*, and, in my opinion, is altogether immaterial.” “The plaintiff,” added Baggalay, J. A., “cannot be regarded as the servant of the company; he was the servant of the contractor.” We have, therefore, on surveying the entire history of this remarkable case, the exchequer division denying the relationship of master and servant between the plaintiff and the defendants, and, in the court of appeals, this denial maintained by Mellish, L. J., and Baggalay, J. A. On the other hand, while Mellor, J., and Grove, J., assert the relationship (if Grove, J., is to be viewed as assenting to this part of the opinion of Mellor, J.), it is propounded

only hypothetically by Cockburn, C. J. And the whole argument of Cockburn, C. J., as given above, goes to show that he rests his conclusion, not upon any supposed contract between the plaintiff and the defendants, but upon the position that he who intelligently and voluntarily undertakes a risk cannot recover from others damages he sustains from the risk he undertakes. In fact, under the state of facts just developed, it is absurd to speak of the relationship of master and of servant existing between the plaintiff and the defendants. The defendants would not have been liable to third parties for the plaintiff's negligence, for it would have been promptly ruled that in such case the offending party was the servant of an independent contractor, and that an employer is not liable for the negligences of a contractor's servants. And, if a suit had been brought by the plaintiff against the defendants for wages, a nonsuit would have been summarily entered, as no contract between the plaintiff and the defendants could have been proved. The plaintiff, therefore, in *Woodley v. Railway Company*, ought not to have been precluded from recovering from the defendants on the ground that he was the defendants' servant. If the judgment of the court of appeals was right, it was right, not because the plaintiff was the defendants' servant, or because he made any contract of any kind with the defendants, but because, on the grounds to be hereafter stated, he was not entitled to recover damages for injuries to which he intelligently and voluntarily exposed himself.

Swainson v. Northeastern Railway Company, which has just been incidentally noticed, and which was decided a few months after *Woodley v. Railway Company*, is a case of so much interest that it deserves the minute examination given to it by an English contemporary. (*London Law Times*, June 23, 1877.) "The Great Northern Railway Company," so is the case condensed in the *Law Times*, "and the Northeastern Railway Company have both a station at Wellington street, Leeds, and the two stations abut upon each other. There are two lines of rails belonging to each company, and ingress and egress from the stations is regulated by signals and points,

which are worked by signal-men, whose duty it is to regulate the traffic of both stations in common. The plaintiff's husband was one of these signal-men, and he had held his appointment four years. He was engaged and paid by the Great Northern Company, and he wore their uniform, and he was not told at the time of his being engaged that he was to be a joint servant. He was, however, as between the two companies, one of what was called the 'joint station staff,' all of whom were engaged and paid by the Great Northern Company, the cost of the salaries of the staff being treated by the companies as a joint charge, and being borne equally between them; and when he received his wages at the end of each week he signed a pay-sheet which was headed 'Great Northern Railway, Traffic Department, Pay-bill, Joint Station Staff.' It was, moreover, his duty to attend to the Northeastern as well as to the Great Northern trains, as to points and signals, whenever any engines or trucks had to be transferred from the rails of one company to those of the other; and he was engaged in the discharge of that duty when he was killed by the negligence of an engine-driver in the service of the defendants, under the following circumstances: On the 7th of May, 1875, Swainson was standing on the six-foot space between the Great Northern and the Northeastern departure lines, when a Northeastern engine came towards the station on the Great Northern arrival rails, with some Great Northern coal trucks. Swainson signaled to the driver to go on to the Northeastern departure line, and he did so, proceeding along the line until he had passed some points; but he then reversed his engine and backed out again, having a van before the engine which obscured his view of the line, and, according to evidence given on the plaintiff's behalf, without sounding his whistle, although it was unsafe, as also stated in that evidence, to back out with a van before the engine. Swainson, when the engine and van were thus backed out, was looking in the other direction, watching a train which was coming from the south, and, failing to observe them, he was knocked down by a step of the van and killed."

Upon these facts the *Law Times* justly remarks: "But were there, in reality—we may be pardoned for asking—such circumstances in this case as to make the deceased man a servant of the Northeastern as well as of the Great Northern Railway Company? He was engaged and paid by the Great Northern Company, and he wore that company's uniform. In those respects, therefore, he had not anything to do with the Northeastern Company. Nor was he even informed, at the time of his being engaged, that he was to be a joint servant of the two companies. These facts were not disputed, be it remembered, on the defendants' behalf; and, this being so, what is the answer which thus far immediately presents itself to the mind if the question 'to whom did he undertake' be applied to the case? And it is a question which—as the learned judges themselves pointed out in their judgment—inevitably arises when it is averred that a particular person was a servant, and that he had undertaken the risk of the negligent acts of his fellow-servants. Surely that answer is not that he had 'undertaken' to the Northeastern Company! And if that be so, then where else in the circumstances of the case is the 'undertaking' or the contract of service with that company to be found? It can hardly be said that it is to be found in the fact that, as to points and signals, it was his duty to attend to the traffic of the Northeastern as well as to the traffic of the Great Northern Company, for that duty arose from arrangement made solely by the latter company, who were his actual employers with the former company, and which would seem to have been, at the most, a letting out of his services on hire for their own advantage. As little would it seem to arise from the signing of the pay-sheet headed with the words already mentioned, for the name of the Great Northern Company alone appeared there, and it was the station, and not the staff of servants employed at it, which was spoken of on that bill as joint."

The judges hearing the case, Barons Pollock and Huddleston, held that, while the evidence did not support the hypothesis of a contract between the deceased and the

Northeastern Railway Company, there was "a common employment in a common service," in which the deceased was engaged with the person by whose negligence he was injured.¹

¹ The following extract from the judgment of Pollock, B., deserves study: "Up to a certain point this is clear that, wherever the person injured, and he by whose negligent act the injury is occasioned, are engaged in a common employment in the service of the same master, no action will lie against the master if he be innocent of any personal negligence. The negligence of a fellow-servant is taken to be one of the risks which a servant, as between himself and his master, undertakes when he enters into the service. This is thoroughly established by the cases of *Priestley v. Fowler*, 3 M. & W., 17 L. J. (N. S.) 42, Ex.; *Hutchinson v. The York, Newcastle & Berwick Ry. Co.*, 5 Ex. 343, 19 L. J. 296, Ex., and other cases. In *Wiggett v. Fox*, 11 Ex. 832, 25 L. J. 185, Ex., the rule was held to apply where Wiggett, the person injured, was the servant of Moss, a piece-worker or sub-contractor, and he by whose negligence the injury was occasioned was in the immediate employ of the defendants; but in that case it is to be observed that, although Wiggett was engaged by the piece-worker, it was a part of the arrangement between the latter and the defendant that the workmen should be paid their weekly wages by the defendant; so that, as was said by Martin, B., in the course of the argument, Moss was not a sub-contractor in the sense that an action would lie against him by a stranger. In *Wilson v. Merry*, in the House of Lords, 19 L. T. Rep. (N. S.) 30, L. Rep. 1 Scotch App. 326, it was held that the master was protected, although the fellow-servant whose negligence caused the injury was a manager. So in *Morgan v. The Vale of Neath Railway Company*, 18 L. T. Rep. (N. S.) 564, 5 B. & S. 570, 736, L. Rep. 1 Q. B. 149; and *Lavell v. Howell*, 34 L. T. Rep. (N. S.) 183, 45 L. J. 387, C. P., L. Rep. 1 C. P. D. 161, where the work in which the two servants were engaged was wholly dissimilar. In all these cases there was, not only a common employment (that is, an employment with a common object), but also common service (that is, service under one master). *Dicta* are, no doubt, however, to be found in some of the cases which tend to suggest that the principle ought to be applied to cases in which the element of common service may be wanting. There is great difficulty in so holding, because, when it is said that the servant undertakes the risk of the negligent acts of his fellow-servant, the question arises, 'Undertakes to whom?' and the proposition must, we think, be limited by confining the undertaking to the master of the servant who is supposed to give it. It cannot, we think, reasonably be extended to strangers, or those who, though having some interest in a joint operation, are not, in some sort, the masters of the person injured. It is not, however, necessary in the view we take of this case to pursue this further. Before dismissing the cases, however, it is right to notice two—namely, *Voss v. The Lancashire & Yorkshire Railway Company*, 2 H. & N. 728, 27 L. J. 249, Ex.; and *Warburton v. The Great Western Railway Company*, 15 L. J.

In two recent American cases we find the non-liability of the employer for an employé's negligence maintained on facts which give no just support to the hypothesis of a contract between the employer and the injured operative.

Rep. (N. S.) 361, 36 L. J. 9 Ex., L. Rep. 2 Ex. 30—which were cited by Mr. Waddy, in favor of the plaintiffs, as governing the present case. In the former of these cases a man named Voss, a blacksmith in the employment of the East Lancashire Railway Company, was working at one of their engines, which was on their siding at the Liverpool station, when an engine belonging to the defendants, and driven by one of their drivers, pushed some wagons into the siding, and so Voss was killed. The station where the deceased man was working at the time of the accident was in the joint occupation of the defendants and the East Lancashire Railway Company; but the deceased was the servant of the latter company, and not of the defendants, and, upon this ground, the court held the defendants were liable. In Warburton v. The Great Western Railway Company (*ubi sup.*), the facts, as stated in the judgment of the court, were as follows: The plaintiff was a servant in the employ of the London & Northwestern Railway Company, and was at work in the Victoria station at Manchester, when an engine-driver in the employ of the defendants, the Great Western Railway Company, having entered the station, shunted a train belonging to the defendants from one part of the station to another, and, in so doing, was guilty of the negligence complained of. The station was the property of the London & Northwestern Railway Company, and was used in common by the plaintiff's employers and the defendants, and other companies. By an arrangement between these companies the defendants' engine-driver ought to have awaited a signal from an officer of the London & Northwestern Railway Company before he shunted the train into the siding; but, without doing so, and without any signal at all, he shunted the train, and negligently caused the injury in question to the plaintiff. Upon these facts the court say: 'We are of opinion that, inasmuch as the injury sustained by the plaintiff was occasioned by the servant of the defendants, not in the course of any common employment, or operation under the same master, but by negligence in the discharge of his ordinary duty to the defendants alone, this case is distinguishable from all which have been decided in relation to the above doctrine of exemption, and that therefore this action is maintainable.' Both these cases were, no doubt, properly decided upon the ground that in each of them it could be correctly affirmed that the servant who did the injury was in the employ of the defendants, and doing their work, and not what was common to that in which the plaintiff was employed. In the present case the circumstances material to the legal position of the parties, and the rights flowing therefrom, are very different. The deceased man, Swainson, though engaged by the Great Northern Company, and wearing their uniform, was one of a joint staff, and for four years had received his weekly wages as such, and he was, therefore, practically in the service of two companies, who, *quoad* his service and employment, were

In *Mills v. Railroad Company*, 2 McArthur, 314, the plaintiff was employed by the Washington & Alexandria Railroad Company to carry the flag before the trains running on that road within certain limits. The Orange Railroad Company had the right of way, by contract, over the track of the Washington & Alexandria road; the plaintiff's duty being to flag all the trains coming over the latter's road. He was employed, when the accident occurred, in flagging a train of the Orange road, by which he was run down. It was argued that he did not keep a proper look-out, and hence was precluded from recovery. The court, however, in ruling that he had no case, rested on the assumption that he was a servant of the Orange road. But what kind of service was this? He made no contract with the Orange Company. He could not have sued that company for wages, nor would that company have been responsible for his negligence. The decision was right, supposing the plaintiff was hurt because he kept no look-out, but the reason was wrong. See, also, *Rawch v. Lloyd*, 31 Pa. St. 358.

In *Johnson v. Boston*, 118 Mass. 114, the evidence showed that the defendant, the city of Boston, was engaged, at the time of the accident which was the subject of suit, in building a sewer in Warren street. The work of excavating and blasting was undertaken by a person named Tinker, who worked through a gang of men of which the plaintiff was one. The plaintiff was injured, so it was claimed, through

partners. But further than this, as was said by Lord Colonsay, in *Wilson v. Merry*, *ubi sup.*: 'We must look to the functions the party discharges, and his position in the organism of the force employed, and of which he forms a constituent part.' Referring, then, to the duties of Swainson, and the very acts on which he was engaged at the time of his death, the evidence shows that they were not performed by him as servant of, or for the benefit of, one company only, but were essentially necessary for the common business of both—namely, the interchange of the traffic between the two stations. The case therefore falls within, and is governed by, the principle that where there is common employment in common service the master is not liable, and our decision must be for the defendants, for whom judgment must be entered.

"Huddleston, B., concurred.

"Judgment for the defendants."

the negligence of the foreman of the sewer department of the city. Was the plaintiff a fellow-servant with the foreman? Could the plaintiff be supposed to have made a contract of service with the defendant? Now, we may well understand how the plaintiff and the foreman could be regarded co-adventurers, and how the one could be precluded from recovering for damage sustained through the other's negligence. But it is difficult to see how the plaintiff could have been held to have made a contract of service with defendant. There was a contract of service, but it was with Tinker alone. Tinker fixed the plaintiff's wages, and determined the place of the plaintiff's work. In neither of the cases above specified is the person who sets up the contract the person by whom the contract was made.

Passing, however, from this examination of the recent authorities, we proceed to notice that a third essential to a contract of service is that the servant should be a competent contracting party, and should actually enter into the contract. But are servants, against whom this privilege of the master is set up, always competent to contract? Might not a child employed in a factory, when injured by a fellow-workman, be barred by the rule before us? Has it not repeatedly been held that a child cannot recover from a master for negligences in the latter's apparatus or service? Is there a single case, in which this result is reached, in which the negligence of fellow-servants is not more or less involved? A volunteer, also, who lends a hand to give a single turn to a single windlass, finds himself as much barred, when he sues the master by this limitation, as if he had been a trusted servant for years. To a contract by a servant, however, it is necessary that there should be a servant competent to contract. But the exception before us is sustained in cases in which the operative is not a servant, and in cases in which, if a servant, he is not *capax negotii*.

A fourth essential to a contract is that it should be lawful. But, by the consent of the great body of our American courts, contracts to relieve a party from the consequences of his negligence are unlawful, as against the policy of the law.

Therefore, even should we assume a contract of this class to be entered into between an employer and an employé, we must hold such a contract to be invalid.

It is clear, therefore, that in sustaining this exception we must cast aside the ground of an implied contract between the operative and the employer. We may proceed, therefore, to the second ground—namely, that the operative ought not to recover because he has an opportunity of watching and reporting on his associates—and enquire how far this ground sustains the limitation before us.

Does the operative in one case out of a hundred of those that come before the courts have the opportunity to inspect his associates? Is he not, by the laws of all difficult and important industries, so tied to his post that he has no time for such observations? Even supposing that he has time, has he the means or capacity? He is in another part of the same building; or, he is in a different building; or, while he is driving a locomotive, his fellow-operative, by whose negligence he is to be injured, is turning a distant switch the wrong way; or, while he is waiting to couple, his fellow-operative neglects to put on the brakes; or, while he is busy cleaning the deck of a great steamer, his fellow-operative is so negligently managing the boiler that it bursts. Even if my fellow-servant stands by my side, I may be incapable, from my ignorance of his specialty, of criticising him; or, his superiority in experience may be such as to make me distrust my capacity for criticism. It is absurd to speak of the sufferer, in such cases as these, inspecting and reporting on the offender's misconduct. And it is still more absurd to make such a supposition when the offender is the sufferer's superior, or when the subaltern knows that if he reports the negligences of his superiors he will soon be without superiors to report. We have, therefore, to reject the idea, that the exemption before us rests upon the fact that the sufferer, in cases of this class, had the opportunity, before the injury, of observing and reporting on the conduct of the person by whom he is to be injured.

On what, then, are we to sustain this conclusion? The

answer is, on the general principle that a party cannot recover for injuries he incurs in risks, themselves legitimate, to which he intelligently submits himself. This principle has nothing distinctively to do with the relations of master and servant. It is common to all suits for negligence, based on duty, as distinguished from contract. For instance, a plaintiff cannot recover for damages incurred by him—

(1) When, on crossing a railway, he strikes against a car negligently left on the road—he being previously advised of the position of the car; or,

(2) When he stumbles on an obstacle left negligently on a highway, he knowing of such obstacle previously; or,

(3) When, after being advised of the danger of attempting to rescue property at a fire, he attempts the rescue.

(4) So we may assume the case of a farmer who puts a tank of inflammable oil close to the fence of a railway over which a hundred locomotives pass daily; the oil takes fire, and the farmer's barn is consumed. He cannot recover from the railroad company for negligently igniting the oil by its cinders. He knew, or ought to have known, that, in the long run, cinders would be negligently dropped; and, if he took the risk of putting inflammable substances in a place where they would be ignited by the cinders, he must bear the consequences.

(5) A green-house, to assume another case, is built in the close vicinity of a barracks where there is constant artillery practice, of which the owner of the green-house knew when he selected its site. Through negligence occur, from time to time, explosions unusually severe. Through the concussion of one of these explosions the glass of the green-house was broken. The owner cannot recover, as he intelligently exposed himself to the risk.

(6) A party of seamen undertake a whaling voyage on shares, and appoint their own officers. During the voyage A is injured by B's negligence. But A cannot recover from C damages for injuries which were exclusively attributable to B, even though C were master of the ship.

Does it make any difference whether or no the party

injured, in either of the cases mentioned above, is a servant suing a master? Or, to take the converse, is there any case in which the servant is precluded from recovering from the master, in which a person not a servant, but a mere stranger would not be precluded, under similar circumstances, from recovery? If so, we may throw aside all that belongs distinctively to the law of master and servant, and hold to the following propositions as sufficient for the settlement, not merely of the present line of questions, but of all cases in which one person is injured by dangerous agencies belonging to others:

1. A person having control of dangerous agencies must so restrain them that they will not injure other persons; and to prevent such injury, he must use the diligence common to good business men in the specialty. This imposes on him the following duties:

2. He must notify persons visiting the place where such agencies are operating of their peculiar danger; and, if such persons are children, having business with him, whom he permits to visit the place, he must provide guards in proportion to their peculiar risks.

3. Against mere trespassers whose presence he has no reason to expect, and for whose protection he is under no duty to provide, he need take no precautions on his own premises beyond those which forbid a person owning property which may be visited by others from putting on it, not for any business purpose, but for punitive purposes of his own, man-traps, spring-guns, or other instruments likely to be fatal to life.

To operatives injured by defective machinery, or by the negligence of other operatives, in a great industrial undertaking, these rules are eminently applicable. If I intelligently enter into a business which has certain risks, I assume these risks, and cannot recover from another person damages arising from them. So far as concerns defects in machinery, this principle holds good in all cases in which these defects could not have been avoided by the party sued, except by the exercise of a diligence beyond that used among good

business men under the circumstances. The difficulty arises when the injury arises from the negligence of one who is a co-operative with the party injured. But if we cast aside, as we have been compelled to do in the preceding argument, the idea that there is in such cases a contract between employer and employé to the effect that the latter is to bear certain risks, then we may regard the employer and his various employés as co-adventurers in carrying on a common enterprise. If so, supposing A, B, C, and D to constitute these common adventurers; A, the employer, is not liable to D for the negligence of B and C, while he is liable for his own negligence, or for the negligence of any person who acts as his specific representative. Did we not hold to this distinction, there are few cases in which a servant injured by defects in machinery could be precluded from recovering from the master. For it would be absurd to say that the master shall not be liable for defects in his machinery not imputable to his own negligence, but shall be liable, on the principle of *respondeat superior*, for his servant's negligences to a fellow-servant. For how can his machinery work without being started; and, if it is not started by *casus*, or by third parties, or by himself, or by the injured party, must it not have been started by the injured party's fellow-servants? But, if the master is not liable to the injured servant for the defects of machinery when negligently started by the sufferer's fellow-servants, then the master's non-liability extends to the negligence of such fellow-servants. We are therefore reduced to the following dilemma: either the master must be held liable to an injured servant in all cases not imputable to *casus* or the intermeddling of strangers, which is absurd; or the master must be relieved from liability in cases where the sufferer is hurt by machinery negligently worked by fellow-servants, in whose appointment, management, and retention no negligence is imputable to the master. The latter alternative we must accept; and it brings us back to the conclusion that the master's non-liability in such cases rests, not on contract, nor on the assumed fact

that the suffering servant had the prior opportunity of watching and correcting the offending servant, but on the principle that a party who voluntarily and intelligently exposes himself to certain risks, such risks being the incidents to a lawful business, cannot recover if he is hurt by the exposure. *Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire.* L. 203, de R. J. 50, 17.

If we adopt this conclusion, we certainly relieve ourselves from the cardinal objection to the law as it now stands. For, if I am only precluded from recovering from my employer in those cases of injuries from fellow-employés which are among the incidents of joint service, then I am not precluded from recovering from him in cases where the service was not joint. If I am injured by a person performing any of the master's duties, therefore I may, adopting the reasoning heretofore given, recover damages from the master himself. If I am permitted so to recover, then we will relieve the law as it exists in England, and in several of the United States, from a provision which gives the great capitalist undue advantages over the small. On this point Mr. Lowe, in the report above given, makes the following telling remarks :

“By declaring that managers are fellow-servants with the laboring men in a mine, a factory, or a workshop, the law has offered a premium on the delegation of all power from the master to his subordinates, since he is relieved by such a delegation from the liability which he had while he managed his own affairs. But to whom is that liability transferred? To inferior agents who are liable, but whom, by reason of their position in life, it is not worth while to sue. Thus, by a change effected entirely for the benefit and convenience of the owner, the workman is deprived of an indemnity which the law gives him, because the law never contemplated the vast industrial undertakings which now exist; and the courts of law, by an imaginary contract, have restricted the claim for compensation to fellow-servants who are unable to pay. This seems to be a case for the application of the maxim, *sic utere tuo ut alienum non lædas*; if the master, for his own

convenience, withdraws himself from the management of his own business, the workman ought not to suffer by the loss of a defendant whose position is a guarantee that he is able to satisfy their just demands, and by the substitution of one who is not, any more than the creditors of the master ought to be deprived of their remedy against him because the debts were incurred by his agents."

In other words, if I am employed in a factory whose proprietor superintends its machinery, then, as the law now stands, he, and the capital he represents, is liable to me for the defective working of the machinery he superintends, if the defect be traceable to his negligence. If, on the other hand, this same superintendent is but the foreman of others, then, negligent as he may have been, these others, who represent the capital invested, and who are, therefore, pecuniarily responsible, are not liable to me, the party injuring me being assumed to be, not my employer, but my fellow-servant. The capitalist, therefore, when superintending his own work, is liable; when not so superintending, is not liable for the negligence of employes. The small capitalist who works in his own factory is thus under a burden, from which the great capitalist who operates through agents is relieved. The decisions, therefore, discriminate in favor of the great capitalist as against the small capitalist, and they tend to give to wealth, when monopolizing various branches of industry, and withdrawing itself from any practical acquaintance with its working of any particular branch, privileges which are denied to the proprietors of small and distinct enterprises which they operate themselves. But it is not for the good of the community that this discrimination should be made. The wealth of the state, if centred in a few capitalists, each with his multitudes of subordinates, is productive of far less public happiness, comfort, and security than it would be if divided among a series of independent men of business, each conducting under his own eyes the specialty with which he is most familiar. If there is to be any discrimination as between the great and the small

proprietor, it should not be against the small proprietor who superintends his own work.²

The conclusions I draw are as follows :

(1) Employer and employés, when uniting in a particular work, are co-adventurers in such work; and no one of these co-adventurers can recover, if there be no concealment of the rates or personal negligence, from another co-adventurer damages for injuries which were incidental to the work. For such injuries the employé can no more recover from the employer than can the employer from the employé.

(2) Co-adventure, however, in this sense, is not convertible with co-service. There are many co-services, under a common master, which are not co-adventures. A clerk making entries in the books of Adams' Express Company in Boston is not a co-adventurer with a driver of the same company in New Orleans. The co-adventure must consist in fellowship in a specific line of work.

(3) Even as to such specific line of work, any co-adventurer may make himself individually bound by undertaking a particular duty. Thus, if he negligently furnishes defective machinery, he is personally liable for the injuries thereby produced to one of his co-adventurers. And this is not because he is master. For such a breach of duty the servant (if the master be personally hurt thereby) is as much liable to the master as is the master, *mutatis mutandis*, to the servant.

(4) One co-adventurer is not liable to a second for the negligence of the third, although the first be the employer of the third, unless the third be at the time acting as the master's substitute in a matter the master agreed personally to undertake, or unless the master, to whom was committed the power of appointment, exercised this power negligently.

FRANCIS WHARTON.

² A thoughtful review of some of the authorities above given will be found in the July number of the *American Law Review*.

IV. NOTES OF CURRENT EUROPEAN LAW.

(No. 5.)

We have dwelt in former papers repeatedly on the essential sameness of the questions that are mooted in continental and English law, under a perplexing difference of method and phraseology.¹ The sameness is daily becoming more evident, and the differences diminish. This is so natural a consequence of the increased intercourse of nations, and the prevalence of cosmopolitan ideas, that it seems hardly worth while to dwell upon it. Whether the process is to go on uninterruptedly until all the civilized nations of the earth have a common law, or is to alternate with a new period of segregation, such as followed the breaking up of the Roman empire, is a question quite too broad to be discussed here. We cannot even attempt to say which would be the more desirable course of events. The theorist may picture the benefits of a universal law, as of a universal language, but it is doubtful whether the attainment of either would not mark the end of all progress, and the inception of a worse than Chinese stagnation. Had such a law and such a language prevailed throughout the past, it is certain that we should have lost all the lessons we now derive from the comparative study of early institutions and tongues. In these we now read the laws of human progress, as the geologist reads the history of the material globe in the varying *strata* of its crust. With only a universal law to look back upon, we should be like geologists reduced to the study of the ocean, rolling now as it did at creation's dawn. This is worth remembering at a time when the effort to make all law

¹ See, particularly, 2 Southern Law Rev. (N. S.) 773, 774.

uniform, and to get rid of all historic privileges and peculiarities, seems so strong as at present.

But, apart from this, there is much direct instruction for the present and future in the study of the different methods in which civilized nations even now build up their jurisprudence, or describe what is already built. The American lawyer, who reads only American and English treatises, or the German lawyer, who reads only German ones, loses thereby not merely a knowledge of foreign law. He learns his own law less thoroughly, because he has no means of estimating by comparison the amount of refraction, so to speak, due to the nature of the medium through which he learns it. Our own treatises are, without exception, casuistic. They are composed entirely of the results of decided cases, either separately stated or reduced to some kind of a rule by a simple induction from a number of decisions. Even those which make the boldest efforts in generalizing never depart from this method. There can, indeed, be no better proof of this than the seeming exceptions furnished by those of our writers who talk most of "principles." When these principles are critically examined, they are found invariably to be the result of a little broader or more daring generalization than the rest. The slightest attempt at deductive reasoning, or the determination of questions by reasons drawn from the nature of the institutions or relations involved, is at once stigmatized as "impractical," and relegated from the field of positive law to the misty realm of "law as it ought to be"—with which no lawyer having a proper professional respect for fees, clients, and "business" should have aught to do. The consequence is that, instead of doing anything to systemize our law, or bring it into a manageable shape, they only help to increase every year the amount of material upon which an anxious bar must work in every case.

In pointing out this result we would not be understood as passing any judgment upon the casuistic method in general. Considered as *the* method of English and American law, its product is sufficient to show that it must have some very great merits, foremost among which we may reckon its devo-

tion to the inductive philosophy. For an inductive system of law must necessarily keep abreast with the age, and avoid that slavery to the conclusions of an earlier time which has always been the bane of deductive philosophy or deductive law. But with this advantage it must accept the concomitant evils. It must constantly grow more complicated, in spite of every possible effort of judges and writers to formulate rules.

There is no better illustration of the old adage that "lookers-on see more than players" than the fact that this characteristic of our law has been overlooked by nearly all who have treated of it professionally, and pointed out by a layman—by Thomas De Quincey, one of the last laymen to whom practising lawyers would probably look for instruction in their own art. Not a few able men, jurists by profession, are constantly at work upon the project of reducing the law to more manageable limits, by some method of skilful digesting, by arbitrary selection of its best parts, or even by some kind of mere mechanical compression. None of them seem to have appreciated the real difficulties in the way of any such process growing out of the very nature of a casuistical science, and inseparable from it. De Quincey alone² (so far as our remembrance goes) has pointed out that the tendency of law, treated as a science of cases, or of those special varieties which are forever changing the face of actions as contemplated in general rules, is, in all states of complex civilization, toward absolute infinity. "Simply because new cases are forever arising to raise new doubts whether they do or do not fall under the rule of law, therefore it is that law is so inexhaustible. The law terminates a dispute for the present by a decision of court (which constitutes our *common law*), or by an express act of the legislature (which constitutes our *statute law*). For a month or two matters flow on smoothly, but then comes a new case, not contemplated or not verbally provided for in the previous rule. It is varied by some feature of difference. The feature, it is

² In his Essay on Casuistry, Vol. I of the Theological Essays, Boston ed., p. 206, 208.

suspected, makes no *essential* difference; substantially it may be the old case. Aye, but that is the very point to be decided—and so arises a fresh suit at law, and a fresh decision.” And he illustrates this by such questions as have arisen under the English Law of Bankruptcy as to who was a “tradesman,” and thus entitled to its benefits; showing that “scarcely is this sub-variety disposed of than up rises some decomplex case which is a sub-variety of the sub-variety, and so on forever.”

In writing thus the gifted metaphysician had no intention to criticize our law or law-books. His object was merely to show that, “after morality [or law] has done its very utmost in clearing up the grounds upon which it rests its decisions—after it has multiplied its rules to every possible point of circumstantiality—there will always continue to arise cases without end, in the shifting combinations of human action, about which a question will remain, whether they do or do not fall under any of these rules. * * * All law, as it exists in every civilized land, is *nothing but casuistry*.”

If this last assertion were correct, the present article would be purposeless, for its main object is to point out in foreign law the example of a treatment of the subject not merely casuistic, like our own. If *all* law in every civilized country were casuistry only, it would of course be in vain to look to Germany for treatises less casuistical than our own. But here we think De Quincey has made the mistake of taking a large part for the whole. Knowing little, probably, of any law but the English, and of that only a few striking features, he was not aware that other nations did not content themselves with merely dividing and subdividing cases, and multiplying rules, but had other methods than mere casuistry for “clearing up the grounds of their decisions.” His assertion, that all law is nothing but casuistry in every civilized land, is perhaps substantially true, if we reduce all law to its original form and occasion. So is all science nothing but observation. But the law is capable of a systematic treatment such as we bestow on other sciences, and it is only by such treatment that it can ever be reduced to its principles.

With the unconscious criticism of the English layman it may be worth while to compare the well-considered one of a German jurist—the late R. von Mohl, whose knowledge of our legal literature might well put to shame a majority of our own writers on the same subject.³

“In the works [on public law] written by Englishmen we are struck with the universal and characteristic lack of comprehensive system which pervades their entire legal literature. There are industrious collections of material, acute works of casuistry, and very thorough treatises on particular subjects, but no scientific mastery of the science as a whole. Even the later works, which in some measure supply the defect, leave much to be desired, especially in administrative law. Nothing, indeed, is plainer than the cause of this imperfection. The entire education of the English lawyer is a thoroughly unscientific and unsystematic one; and, consequently, when he writes a book he neither feels the need nor has formed the habit of systematic treatment. * * * It is a rare exception, founded on a natural turn for system, when one feels the necessity of an orderly arrangement of his matter, instead of contenting himself with a general treatment of the points that occur oftenest in practice, and with the collection of authorities. But this condition of things is none the less objectionable because it is easily accounted for, and that to the Englishman himself as well as the foreigner.” And in another place he speaks of “that class of English law-books so distasteful to the continental reader. Instead of grasping the essence of the subject, presenting its leading principles, and deducing therefrom the logical consequences as rules of law, the reader is plunged at once into detail, his acquaintance with the intention and spirit of the law taken for granted—or, rather, left out of sight as superfluous knowledge—and the subject buried under an accumulation of authorities. Such a method of treatment may, in a certain

³ We know of no account of “The Literature of English Public Law” in our own language comparable to that given by Prof. von Mohl in the second volume of his “History and Literature of the Science of the State.” The above passages are from that volume, pp. 7, 101.

low sense of the word, be practical, but it gives no idea of the subject as a whole, does not contribute to a sound judgment of what the law really is, and does not produce lawyers who can rise above the petty details of daily practice to interpret and develop the law according to its true spirit. Still, there is no use in finding fault with what results from the whole education of the English lawyer, and is adapted to it. *He* would regard any other method of treatment as superficial; *perhaps as incomprehensible!*"

This is severe criticism, but we fear it would be easier to retort upon it than to refute it—easier to show that our law has also great merits which other systems lack than to diminish the force of this accusation. But the mission of comparative jurisprudence is, not to establish a herald's table of precedence among systems of law, but to show how and where each people may learn improvement from its neighbors. At a time when our own law seems to be actually breaking down under the accumulated weight of its own material, and when its ablest students are trying every experiment to save it from the fate which De Quincey⁴ foretold more than a generation ago, we need every help we can find to a better, more scientific, more concise legal method.

The present number of the "Notes" has been suggested chiefly by a work received some months ago from Germany, but which we have only of late found time to read through with the attention it deserves.⁵

It treats of the evidence of parties to the suit on their own behalf, and contains a very full *résumé* of the present law of nearly all civilized countries in this regard. This occupies about five-sixths of the work. It is, as the author

⁴ See note (2) to the essay quoted above, referring to "the alarming amount of the Roman law, under which the very powers of social movement threatened to break down. Courts could not decide, advocates could not counsel, so interminable was becoming the task of investigation. *The same result now menaces England, and will soon menace her much more.*" This was published in 1839.

⁵ Die Parteienvernehmung und der Parteieid, nach dem gegenwärtigen Stande der Civilprocessgesetzgebung, von Dr. Philipp Harras, Ritter von Harrosowsky. Wien, 1876. Pp. xvi. 364.

himself says, of very unequal value in its various parts, and may be regarded as a storehouse of material, from which the reader as well as the author may draw, for the attack as well as the defence of the positions taken in the preface and conclusion—of which we will speak hereafter. To an American lawyer its most interesting feature as a treatise on law is that not a single case is quoted from beginning to end, and that the whole book is devoted, not to setting forth the rules under which parties shall testify, but to a study of the subject announced by the title as an historic institution, the nature of which must be determined as a means of deducing therefrom its practical uses.

If any English or American writer has discussed the question of admitting parties to testify in their own cases from any other point of view than the mere prospect of obtaining true or false evidence on the whole from witnesses whose position implies so direct an interest, the discussion has escaped us. Certainly none have ventured to consider it, as our author does, in its connection with the broadest problems of civilization; with the questions, how far truthfulness, in and of itself, is an object for which that civilization must strive; when any substitute for certain truth may be accepted in the administration of justice; how far we must be content with such substitutes; and what rules of a party's evidence may be properly deduced from these considerations.

In the preface we find a statement of the sources from which all civilized nations have derived their rules respecting the testimony of parties to the suit. In this case, as in almost all others of legal practice, these sources are three—the Roman law, the Germanic (or, in our own phrase, the common) law, and the canon law. Each of these has contributed its own share to what seems to us so simple and homogeneous an institution as the admission of a party to the suit to testify in his own behalf; and each of these, as our author very clearly shows, makes contributions which are very distinctly stamped with the impress of its own conception of the oath and of the use which may be made of it in litigation.

The Roman law claims as its own contribution the employ-

ment of a party's oath as a means of determining a controversy, and also as a means of convincing the mind of the judge or jury charged with the decision of such a controversy—two aspects that may easily enough be confounded in that exclusive consideration of final results which characterizes our legal thought, but which in fact differ very widely from each other when we come to consider the necessary conditions and limitations of either use. In the former case the party's oath is of itself a decision of the suit, and therefore prevents and renders unnecessary the office which in the latter it fills. It is exemplified by the cases where the complainant has the right to demand that the defendant shall either deny upon oath the cause of action, or shall admit him to prove that cause by his own oath. One of the most remarkable and unexpected forms in which it appears is naturally enough unnoticed by our author, since it is the result of the rule as to verification laid down by most of our new American codes. This rule requires the defendant to answer on oath the sworn complaint of the plaintiff, or else to admit by default the truth of that sworn complaint. Unlike as this seems in outward form to the *juramentum delatum* of the civil law—one of the institutions of that law which, at first sight, seems to have disappeared most completely from our own—yet the coincidence in results is a striking proof that neither owes its existence to mere positive enactment.

In the other use of the party's oath which we owe to Roman law we have something altogether different. No rule of procedure decides the judgment as a mere result of the acts or omissions of the parties, but it is the condition of the judge's own mind upon which that decision depends. In this case the Roman law supposes that the parties have produced on either side their allegations and proofs without succeeding in establishing in the judge's mind a conviction that one or the other is entitled to the decision in his favor. It allows him then to call upon one party or the other to add his own oath as a means of inclining the scales of justice on the side shown by that oath to be in the right.

If we turn now to the Germanic law, including under that

name our own common law as it existed before the Norman conquest, we find that neither of the foregoing conceptions, familiar and even necessary as they seem to us now, had any conscious place there. The distinction between them, which alone gives to each its proper character, was unknown to our ancestors, because they had, in fact, no conception of a decision as dependent on the judge's conviction of the truth or falsehood of particular facts.

It was a fundamental principle of the law of the entire Germanic race that every citizen of unimpeached character—every one who, in their own expressive phrase, was “law-worthy”—could by his own oath clear himself from any charge or claim made against him. That this principle survived long enough to leave its traces in a few American decisions upon “wager of law” is universally admitted. Perhaps some of our readers will hardly be prepared to learn from our author that its contributions to modern jurisprudence have been much larger than this. The need of constant qualification and safeguard against abuse has, indeed, been constantly at work to limit and repress this, while its civilian antagonist has been constantly developing new strength and new applications, since its first introduction into the practice of modern Europe. Still, the Germanic principle—which may be briefly designated as a privilege or right of proof, in contrast to the Roman *onus probandi*—is correctly said by our author to maintain its place in modern law against its rival. Some marked instances of its presence will be shown farther on.

The contributions of the church to our modern law of evidence were made in part by her own legislation, in part by the influence she exerted upon the reformation of the temporal procedure. We owe to her, at least in large measure, our modern conception of the oath as a guarantee of the truthfulness of an assertion; a simpler and clearer notion of its true office than we find either in the Roman or early Germanic law. This of course excluded its employment as a means of making a party judge in his own cause, and placed under the control of the court its use as a means of

proof. The canon law, freed from the earlier civilian distinction between procedure *in jure* and *in judicio*, between the powers of the pretor, or other magistrate, and the *judex* to whom he committed the trial of the particular issue—and freed from it, we may remark, though our author does not notice the fact, by a change of procedure which dispensed with the *judex* entirely, and left all power in the hands of the magistrate—went on constantly enlarging the power of the court over the conduct of the case, and constantly narrowing the limits within which the decision of the issue was left to the personal opinion of the judge. The oath of the party was employed, not merely to verify assertions of fact, but also to assure the justice of his demands, and the correctness of his procedure—uses of which we may find modern examples in the oath to a bill of particulars, and to an affidavit of merits. At the same time the Roman *interrogatio in jure* was developed by the canon law into a process for the discovery of all the facts in a case, which may enable the party having the burden of proof to obtain from his opponent such admission as will render all other evidence superfluous. Thus the foundation was laid for a complete reconstruction of the parties' evidence. The judge was enabled to neglect all the previous means of proof, and to betake himself at once to the parties either to ascertain exactly the positions they took in attack or defence, or to avail himself of their statements as a means of forming his own conclusions upon the questions submitted to him for decision.

Our author makes here a remark which seems to us of unusual pregnancy, and worthy to be kept in mind by all students of the mediæval *origines* of modern law. To account for the manner in which these various conceptions, derived from entirely different sources, modified each other, and the great complexity of practical forms to which they gave rise, he reminds us that at that period no distinction was recognized between legal, moral, and religious obligation. All were of the same nature, and constituted one science, if the term science can be applied to the views then held upon them. If a religious sanction, like that of the

oath, was employed in the course of a purely legal proceeding, no inconsistency was felt, because it was the same power that imposed the law and punished the sin of perjury. Since jurial and religious obligations have been more clearly distinguished, such blending of their practical forms is no longer possible, or only produces confusion.

The proof of the last assertion is found on almost every page of the work, but may be most clearly read in the closing chapter, where the author has collected the most striking diversities of European and American legislation with respect to the form of oaths and the mode in which they are administered. Want of space must prevent our translating the passage, but it illustrates most clearly the position of the oath, essentially a religious act, in modern law—the uncertain, almost capricious, use made of it in temporal legislation, and the confusion of ideas thus produced. The great variety of forms and rules referred to cannot be attributed to any new uses discovered for the oath by modern jurists. On the contrary, the whole tendency of modern law is to limit its office to the single task of furnishing evidence of facts for the consideration of judge or jury. The exculpatory oath of our forefathers has entirely disappeared. Of the Roman oath *in jure* some traces, indeed, remain where the oath of the party still appears as virtually the decision of the case, thus increasing the confusion and complexity of the subject. For, wherever the oath is still allowed to retain this character, there must of course be rules and distinctions to mark off the power of decision thus given to the party from that which belongs, and in modern law belongs only, to the judge or jury—the power of deciding the case by their own convictions of the truth of fact.

But why is it that these remains of Roman doctrine adhere to our law, while its tendency in general is so strong, as already has been said, to regard the oath simply as a verification of evidence designed to operate on the judge's mind? Our author's account of this, ingenious and acute as it certainly is, is one of the few passages in the work from which we would dissent if we had space at once to state fairly his

position and our reasons for doubting its strength. He attributes it to the distinctions made between Pleading and Evidence, using these terms in the full technical meaning of our American law—or, to use his own phrase, between assertion and proof, between the statement of a party's claim and the means by which he produces a conviction of the truth of those claims in the judge's mind. But we must state his theory in his own form (p. 317).

The fancied analogy between an action at law and a contest for a prize—which may be traced back to the judicial combat—has influenced legislation, and contributed not a little to the general acceptance of the doctrine that each party might set up in his pleadings a claim of hypothetical facts, which it was for the evidence afterward to test and reduce to the truth; that each might endeavor to earn the judge's decision in his favor by a process quite different from that disinterested examination of the truth which the same party would regard as his duty in political life, in science, or in private intercourse with his fellows; and, consequently, that the allegations made by each party in the case were to be differently regarded from those of other witnesses, and their allegations in the pleadings from those made in other positions. The result was that these allegations came to be regarded only as a means of information respecting the issue to be tried—not of evidence; that they could not be taken for true unless verified by oath, and even then only in cases (*e. g.*, of default, or unanswered allegations) where there was nothing for the judge to pass upon; and that the oath of a party must be considered, not like that of any other witness, as addressed to the judge's convictions, but as a distinct step in the proceeding, with its own practical result. A pleading, even verified, was not a part of the evidence; if the party's oath was to become such, it must take a different form.

The opposite view to the one thus given our author represents as now prevailing in the form of a reaction from it, and as reducing every action at law to a pure scientific process for the discovery of truth. In such a process every allegation made by a party, whether in the form of pleading

or evidence, has the same value, and the judge is entitled to rely upon it as true. He may even punish a misstatement of fact in the pleading, as he would perjury on the stand, without any consideration of the party's right to withhold allegations prejudicial to his own side of the case. In fact, he cites as illustrations of the latter view—his own—certain statutes—Zurich, India, etc.—punishing a false statement in an unverified pleading as a crime; while, as a parallel illustration of the older view, he refers to an ordinance of the Papal States of December 9, 1837, declaring that even false swearing, in the answer made by a party to *positiones*, or interrogations propounded by his opponent, is not punishable.

We can only indicate in the briefest possible manner the answer that an American lawyer would probably make to our author's view. We are so accustomed to consider law as a mere congeries of independent rules, each of which is to be valued simply by its practical effect in the attainment of justice, that such a lawyer might not fully appreciate the reason of the dislike felt by writers on systematic law to the mingling of different and inconsistent principles in the same rules. If each distinct use made of a party's oath tended on the whole to a right decision of the case,—if, in the favorite phrase, it "worked well"—we might hardly see why that oath should not be permitted in one instance to decide the case *ipso facto*, upon the Roman conception of its use, even though in others its office was limited simply to influencing the decision of the judge. Only those who have occasion to write upon the law, to teach it to students, or to frame legislative rules for its improvement, would appreciate the fact that every such inconsistency is something more than a theoretical evil; that it makes our law harder to learn, more difficult to apply, less uniform in its decisions; in short, that it is just these incongruities on the theoretical basis of law which produce the practical delays, uncertainties, and failures of justice that the laymen are so ready to impute to the ignorance and depravity of the profession. But even those of our number who agree fully with our author in this conception of law as a science, and of the value of harmony

and logical consistency in its rules, would probably object to the assumption that lies at the base of his reasoning here. They do not believe it to be merely a "survival" from the judicial combat of the middle ages that gives to an action at law the nature of a contest, or think that the decisions of a legal issue can ever be reduced to a purely scientific search after truth. The essential difference between a "truth" and a "right" seems to us to be too deep for this. Man is not a creature whose actions are shaped, or, in this state of existence at least, ever can be shaped, by the laws of eternal truth. He knows in part only, and it is not until he knows even as he is known by his Creator that two litigants upon opposite sides of a controversy can unite in the calm, dispassionate search after the abstract right of the matter, in the spirit with which they might pursue a question of science. There is implied in the very conception of a right an element of assertion, of claim, of strong-handed maintenance if need be; and it is not in human nature to assert one's rights against opposition, and at the same time to pursue a purely judicial temper. Hence the distinction between pleading and evidence seems to us founded in the very nature of the case. In stating their respective claims the parties must be allowed a certain latitude, if only to cover the uncertainties of a yet untried issue. Each must be permitted to allege in the beginning all that he may, under any aspect of the evidence, establish his right to at last. To refuse this would be to require him to surrender in advance every point that is at the outset doubtful between him and his adversary—the absurdity of which, or at least its inconsistency with the very object of litigation, is evident.

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V. EFFECT OF TENDER TO DISCHARGE LIENS UPON PROPERTY HELD AS SECURITY FOR DEBT.

I. A Tender of the Sum Due extinguishes the Lien upon Personal Property held merely as Security for Debt.—In an early case the court, in stating the reason for this rule, says “there is a difference between a mortgage of lands and a pledging of goods, for the mortgagor hath an absolute interest in the land, but the other hath but a special property in the goods to detain them for his security.” *Radcliffe v. Davis*, Cro. Jac. 245.

In Addison on Torts, 451, this language is used: “Whenever a person has a lien upon goods for the payment of money due upon them * * * the lien may be extinguished by a tender of the money due.” See, further, in support of the rule as stated, Smith’s Manual of Common Law, 229; 3 Pars. on Con. 248; Story on Sales, 285.

In such cases the rule requiring the tender to be kept good does not apply. The *debt* still remains, but the *lien* is gone absolutely and forever. Nothing can revive it. *Moy-nahan v. Moore*, 9 Mich. 9.

II. The same Rule now Governs in Case of Mortgages on Real Estate.—Originally, a mortgage vested a legal estate in the mortgagee. He might, wherever he saw fit, either before or after condition broken, dispossess the mortgagor by ejectment or other proper proceeding. The mortgagor might defeat the mortgagee’s title by payment or tender upon the precise day the debt became due. If, however, he suffered this day, called *law-day*, to pass without making such payment or tender, he had no further rights *at law*. Equity, however, stepped in to mitigate the rigor of the law by allowing a mortgagor who had made payment or tender after law-day his right of redemption. While the law

remained in this condition, neither payment nor tender were sufficient of themselves to extinguish the mortgagee's title. In this respect payment and tender after law-day had precisely the same effect. In either case a suit in equity was still required to extinguish the mortgagee's title.

In cases where such suits were founded upon a mere tender, courts of equity always applied the principle that he who seeks equity must first do equity, and required that the tender be kept good as a condition necessary to an allowance of the relief sought.

This original theory of actual title in the mortgagee will, it is believed, be found to be the basis of the numerous decisions (overruled cases excepted) holding that a tender must be kept good in order to discharge a mortgage lien.

Afterwards, in most states the law upon this subject underwent a radical change. The mortgagee, instead of having a perfect title at law, has no title at all. Even after default he must still resort to legal proceedings in order to divest the title of the mortgagor. The mortgagor, after making payment or tender, has no occasion to call upon a court of equity for relief against the mortgagee's title simply because the latter neither has, nor ever did have, any title. Instead of relying upon payment or tender as weapons of offence with which to destroy the mortgagee's title, he relies upon them as a defence to protect his own. The maxim that he who seeks equity must first do equity has no application to him. He seeks nothing. Satisfied with the existing order of things, he only desires to be let alone.

The supreme court of Kansas, in speaking of the revolution undergone by the law of mortgage, uses language equally and generally applicable elsewhere.

"The mortgage vests no title and gives no right of possession even after breach. The common-law attributes of mortgages have been by statute wholly set aside, and the ancient theories demolished. The statute gives the mortgagor the right of possession even after breach, and confines the remedy of the mortgagee to an ordinary action

and sale of the mortgaged premises, negating the idea of title in the mortgagee." *Chick et al. v. Willets*, 2 Kan. 385.

It will be observed that, under the law of mortgage as thus stated, there is no longer any reason for the distinction pointed out in *Radcliff v. Davis*, *supra*, between a pledging of goods and a mortgage of lands, as to the effect of tender. The reason for the distinction failing, the distinction itself fails, and a mortgage of lands is thus brought within the reason of the rule as stated in that case, and by Smith, Addison, Story, and Parsons, above cited.

Accordingly it will be found that, wherever the law of mortgage as above stated prevails, courts hold that tender after law-day, and even after suit brought for foreclosure, and, though not kept good, extinguishes the lien of the mortgage.

The court, in *Kortright v. Cady*, 21 N. Y. 366, in speaking of this precise point, uses this language:

"It is impossible to hold otherwise, unless we also say that the mortgage, which was before a mere security, becomes a freehold estate by reason of the default. That this is not true has been abundantly shown." See, also, in support of this proposition, *Caruthers v. Humphrey*, 12 Mich. 270; *Ladue v. D. & M. R. R. Co.*, 13 Mich. 393; and 26 Mich. 500.

In the case of *Perre v. Castro*, 14 Cal. 519, the decision was adverse to the rule now stated. It was rendered prior to the decision of *Kortright v. Cady*, *supra*. In the subsequent case of *Hayes v. Joseph*, 26 Cal. 514, the same court refer approvingly to *Kortright v. Cady*, and throw grave doubt upon the prior case of *Perre v. Castro*; and, again, in the case of *Ketcham v. Crippen*, 37 Cal. 223, the court virtually overrule *Perre v. Castro*, and say, "we think the reasoning in the case of *Kortright v. Cady* unanswerable."

L. W. KEPLINGER.

VI. BOOK REVIEWS.

A TREATISE ON THE WRONGS CALLED SLANDER AND LIBEL, AND ON THE REMEDY BY CIVIL ACTION FOR THOSE WRONGS. To which is added, in this Edition, a Chapter on Malicious Prosecution. By JOHN TOWNSHEND. Third Edition. New York: Baker, Voorhis & Co. 1877.

While we may not agree with Mr. Townshend that the principles of the law of libel have been more subject to perversion and less scientifically treated than those of any other branch of the law, it must be conceded that, with the profession at large, especially in this country, these principles are, perhaps, less understood than are those of any other branch of the law of torts. To the average practitioner the law of slander and libel is a sort of *terra incognita*, across whose threshold he ventures but rarely, and then with hesitating and doubtful steps. Many lawyers pass through a life-time of successful general practice without once receiving a retainer in an action for slander or libel. Especially is this true in the larger cities and business centres, where the commercial branches of the law naturally receive the largest degree of attention, and absorb in great part the time and labors of the profession. And yet this very tendency, so far from rendering treatises upon this branch of the law undesirable, rather serves to emphasize the necessity for their preparation and use, since it is in those branches which are least generally understood that students and practitioners need most assistance.

Mr. Townshend's work, now in its third edition, has been long enough before the profession to have attained its proper rank in our legal literature. And that rank is certainly a high one. The book has become a standard authority, and has received the favorable verdict of a profession whose verdict upon the merits or demerits of the tools of their trade, if sometimes generous, is never unjust. And the author has certainly shown in this, as in his previous editions, what he tells us constituted a principal feature of his endeavor—that, when properly understood, the wrongs called

slander and libel, as well as the legal principles applicable to those wrongs, present no exceptional features other than, or different from, the law of torts in general; and that there is nothing in the law of libel rendering it intrinsically more difficult of comprehension than any other branch of our jurisprudence.

And yet we cannot agree with the author that this or any other branch of the law may be reduced to the certainty of an exact or mathematical science. Briefly stated, his argument is that mathematical science is certain, not because its definitions are true, but because they are certain; and, *per contra*, legal science is uncertain only because its definitions are uncertain. But many legal definitions are as certain and precise as those of mathematics or any other of the exact sciences, and yet the greatest uncertainty may exist in the application of legal principles to the facts of a particular cause. The truth is that the law is not yet—and, unless by means of some undiscovered method of codification, can never be—an exact science. Perhaps its nearest approach to exactitude may be found in the system of common-law pleadings; while in the law of torts, to which the law of libel sustains the relation of species to genera, we are certainly farther away from the precision of the exact sciences than in the law of contracts, of evidence, or of real property. The difficulty—unnoticed by Mr. Townshend—is that, while in mathematics the premises of every argument are generally true, in law we can seldom be quite certain of the major or minor premise of our argument, and, indeed, comparatively few methods of legal reasoning are susceptible of being formulated in the syllogistic process.

In his definitions Mr. Townshend is certainly fortunate. Without attempting to be exhaustive, he contents himself with clearness and consistency, using always the same terms in the same sense. Regarding the law of libel, in its broadest sense, as including most, if not all, of the wrongs effected by means of language, he limits the scope of his work to so much of it only as applies to slander and to libel as a private wrong, in distinction from its criminal aspect. Without attempting to construct strictly accurate definitions, he defines slander and libel as “wrongs occasioned by language or effigy—that is to say, slander is a wrong occasioned by speech, and libel is a wrong occasioned by writing or effigy” (p. 81). Though not exhaustive, these definitions are sufficiently descriptive, and the author is consistent in their use throughout his entire work.

A noticeable feature of the work is the prominence given to the pecuniary injury as the gist of the action for slander or libel. Treating reputation as a relative, and not an absolute, right (p. 93), and regarding one's right to its uninterrupted enjoyment to be—like his right to the enjoyment of his property—subject always to such conditions as are imposed by the general welfare, the conclusion is reached (p. 108) that the protection afforded by the law in actions of slander or libel is to property, and not to reputation, as such, independent of pecuniary loss. And, while conceding (p. 110) that the law does in fact, and to a great extent, protect reputation, the author insists that it does so indirectly and by means of a legal fiction, the assumption of pecuniary loss, since certain language is regarded *per se* as proof of such loss. We do not remember to have anywhere seen the distinction better stated, or supported by more satisfactory reasoning.

Perhaps the most satisfactory, as it is certainly the most instructive, portion of the work is chapter IX, in which are treated the defences to the action, including, among others, the topics of the Privileged Publications, Truth of the Publication, Legislative and Judicial Proceedings, Freedom of the Press, and Criticism. The treatment of the topics here indicated is certainly masterly, and leaves little to be desired. Privileged communications are held to comprehend all statements made in good faith in the performance of a duty, or with a fair and reasonable purpose of affording protection to the person making them, or to whom they are made. In other words, a communication made *bona fide* upon any matter in which the person is interested, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty in the subject-matter, even though the communication contains criminary matter otherwise slanderous or actionable (p. 351). This, of course, embraces all communications made in judicial proceedings, either by judges, counsel, parties, or witnesses, if made in the direct line of their duty. And the general proposition here stated affords the key-note to the author's discussion of the entire range of defences in actions for slander or libel. The modern doctrine that the truth of the matter published is a complete defence to an action, either of slander or libel, is also satisfactorily, though somewhat briefly, discussed in the same chapter (p. 357 *et seq.*).

The subject of reports of judicial proceedings is not the least instructive of this chapter, and is one whose intrinsic importance

certainly commends it to the careful attention of the bar and bench. In this connection the note to page 407 affords an excellent commentary upon the tendency of the courts to a greater liberality in their treatment of fair discussion, or impartial reports of their proceedings. The case cited is that of Horace Greeley, against whom proceedings were instituted for a contempt of court. It appears from the note that during the trial of one Nixon, in the court of oyer and terminer, of New York city, in April, 1864, an article was published in the New York *Tribune*, entitled "A Judicial Outrage," and which was supposed to reflect upon the conduct of the presiding judge, G. G. Barnard. A rule was accordingly issued requiring Mr. Greeley to show cause why he should not be attached for contempt, and he was required to answer certain interrogatories with reference to the authorship of the article in question. Mr. Greeley, in response to the interrogatories, filed a manly statement, in which he asserted that he was the principal editor and one of the proprietors of the *Tribune*, and, as such, subject to all the responsibilities justly pertaining to such relations. He concluded by declining to answer any questions that might expose any of his associates in the *Tribune* to the discipline of the court, expressing his preference to abide, in person, the consequences, whatever they might be. The court, being satisfied that no disrespect was intended, discharged the doughty editor.

Space will not permit an extended criticism of the author's discussion of the freedom of the press, and its kindred topic of criticism, although, both to lawyers and laymen, these are doubtless the most entertaining parts of the work. Suffice it to say that here, as elsewhere, Mr. Townshend has shown the most painstaking care in the collection and use of his materials, and has presented an instructive commentary upon what always has been, and always will be, the most interesting phase of the law of libel—that which touches it in its relations to the public press. Here, too, as elsewhere, he indulges in a somewhat free spirit of criticism of the views of leading jurists, especially of Lord Chief Justice Cockburn, whom he criticizes severely, yet, in the main, fairly. Referring (p. 491, note 1) to the charge of the lord justice in *Seymour v. Butterworth*, 3 Fost. & Fin. 384, the author expresses his emphatic dissent from the language used by his lordship in speaking of the rights and duties of a public writer as if he were endowed with peculiar rights, while the law recognizes no such station as that of public writer, and, unless by statute, affords him

no exceptional privileges or advantages. Equally just is the author's criticism, in the same note, upon the distinction drawn by Cockburn between public and private men, and between public and private acts. The law of libel recognizes no such distinctions, although the judges may, and sometimes do, afford them a *quasi*-recognition.

In a work of so much real excellence we regret the more to observe certain minor blemishes, which, though pertaining rather to matters of taste than of substance, might better be omitted. Prominent among these is the tendency of the author to magnify his own labors, and to disparage those of his predecessors in the same field. He assures us in his opening chapter that, while profoundly sensible of his comparative inability to do justice to his subject, he yet flatters himself that he shall be able to lay before his readers a "more systematic outline of the principles of the law of libel than any which has hitherto been offered or attempted." And, in the succeeding section, we are told that "the meagre attempts heretofore made to reduce the subject into any systematic form will oblige us, to a considerable extent, to treat the subject as *res nova*." Surely the excellent treatise of Mr. Starkie, long a standard work, is deserving of fairer treatment. Nor do we need to be assured, in the same chapter, that the author "really has no pet theory to maintain," or that he will "most religiously abstain from any intentional garbling of authority, or the wilful withholding of any decision or *dictum*, in order to support any particular view or theory."

"The lady doth protest too much, methinks."

Barring these minor faults, upon which we have, perhaps, already laid too much stress, we have only words of commendation for the thorough and honest work displayed in every page of Mr. Townshend's treatise. He has drawn his materials from an unusually extended range of investigation, reaching far beyond the reports of adjudicated cases, and covering a wide domain of contemporaneous literature—English and American—from which he has freely illustrated and enriched his subject. Singularly accurate in his mental processes, and equally felicitous in giving them expression, his treatment of the subject is always clear, often philosophic, sometimes profound. And the result is a work which, if we mistake not, will live far beyond the present generation of lawyers.

H.

UNITED STATES REPORTS. SUPREME COURT. Vol. 94. Cases Argued and Adjudged in the Supreme Court of the United States. October Term, 1876. Reported by WILLIAM T. OTTO. Vol. IV. Boston: Little, Brown, and Company. 1877.

Mr. Otto's latest volume is larger than any of its predecessors, presenting 824 pages of reported cases. We have heretofore called the attention to certain excellences in this series of reports, and also to certain respects in which we would be glad to note further improvement. We observe no change in these respects. The reporter may now be set down as ranking above the average of reporters, while not yet entitled to the highest place.

A noticeable feature of the present volume is the presentation of not less than ten cases involving letters-patent, the opinions in which are generally carefully drawn and important. Mr. Justice Clifford seems to be the member of the bench who makes this class of cases a specialty, he having delivered the opinions in four of these ten cases, while the others were divided among five other justices. Among these cases, that of *Cochrane v. Deever*, p. 780, will attract attention, as the case involving the new processes for manufacturing, bolting, and purifying flour; which case has been made the basis of numerous late suits in various localities against millers using the new or French process of grinding flour, and in which suits the defence is set up that this decision in *Cochrane v. Deever* is void for fraud.

The patent cases in this volume illustrate, we think, a tendency in the court to restrict the field to be covered by patented inventions. *Dunbar v. Myers*, p. 187, involves an improved machine for sawing thin boards. The improvement, which consisted in the employment, behind the saw, of two deflecting plates instead of one, was held not patentable because devoid of "invention," in the sense of the patent laws. The celebrated "door-knob" case of *Hotchkiss v. Greenwood*, 11 How. 267, was followed as an authority, the court saying: "It was decided by this court more than a quarter of a century ago that, unless more ingenuity and skill were required in making or applying the said improvement than are possessed by an ordinary mechanic acquainted with the business, there is an absence of that degree of skill and ingenuity which constitute the essential elements of every invention." This declaration, from a now united court (Mr. Justice Woodbury dissented in 11 How.), will doubtless become a canon of construction in all controversies over

letters-patent, where the pure question of "invention" is at issue. *Merrill v. Yeomans*, p. 568, further illustrates the restrictive tendency of the court. The patent, which specifically covered a new method or process of producing deodorized, heavy, hydrocarbon oils, was held not to cover the manufactured article. The "claim" of the patentee, being distinguished from his "description" or "specification" by the learned court, was held not broad enough to cover anything more than the mere process. The case is summed up as follows: "The growth of the patent system, in the last quarter of a century, in this country, has reached a stage in its progress where the variety and magnitude of the interests involved require accuracy, precision, and care in the preparation of all the papers on which the patent is founded. It is no longer a scarcely-recognized principle struggling for a foot-hold, but it is an organized system with well-settled rules, supporting itself at once by its utility and by the wealth which it creates and commands. The developed and improved condition of the patent law, and of the principles which govern the exclusive rights conferred by it, leave no excuse for ambiguous language or vague description. The public should not be deprived of rights supposed to belong to it without being clearly told what it is that limits these rights. The genius of the inventor, constantly making improvements in existing patents—a process which gives to the patent system its greatest value—should not be restrained, by vague and indefinite descriptions of claims in existing patents, from the salutary and necessary right of improving on that which has already been invented. It seems to us that nothing can be more just and fair, both to the patentee and to the public, than that the former should understand, and correctly describe, just what he has invented, and for what he claims a patent."

Leading and important cases upon other topics are also to be found in this volume. *Relief Fire Insurance Company v. Shaw*, p. 574, holds that valid contracts of insurance may be made by parol as well as by written policy; thus following, although without noticing it, the doctrine of *Insurance Company v. Colt*, 20 Wall. 560. *Doyle v. Continental Insurance Company*, p. 535, is the case in which the court, while holding to the doctrine of *Insurance Company v. Morse*, 20 Wall. 445, that an agreement of a foreign corporation not to remove its cases to the United States courts was void as against public policy, yet held, over the dissent of Justices

Bradley, Swayne, and Miller, that the right of the state to exclude the foreign corporation for failure to make or comply with such an agreement cannot be interfered with by the federal courts.

Two cases upon life insurance, which have been widely published in the legal journals, treat of the interesting question of insurable interest. *Connecticut Mutual Insurance Company v. Schaefer*, p. 457, is the case of survivorship between husband and wife, after divorce, as affecting a joint policy, taken during the marriage, on the lives of both, for the benefit of the survivor. It was held that the divorce caused no cessation of the insurable interest. In *Ætna Life Insurance Company v. France*, p. 561, a sister is held to have an insurable interest in the life of her brother by reason of relationship alone.

In *McCready v. Virginia*, p. 391, a law is sustained which prohibits citizens of other states from planting oysters in the soil covered by the tide-waters of Virginia. In *Davis v. Brown*, p. 423, a suit against endorsers on a promissory note allows the endorsers' contract to be limited, by extraneous written evidence, to an endorsement without recourse. *Muller v. Dows*, p. 445, shows how the old controversy over the citizenship of members of corporations created by state laws has been settled by the establishment of the doctrine, for the federal courts, that, for all purposes of jurisdiction, it is conclusively presumed that all the stockholders are citizens of the state which created the corporation.

Ex parte Smith, p. 455, holds that there can be no presumptions in favor of the jurisdiction of the courts of the United States, but that the facts upon which it rests must affirmatively appear in the record of every suit in such courts; so the fact that the relators claimed title under the revenue laws of the United States was not sufficient, under the act of March 2, 1833, to give jurisdiction, where it did not also appear that such title was disputed.

Johnson v. Harman, p. 371, is an entertaining case, involving the practice in equity where a feigned issue is submitted to a jury. Such cases are not put upon a parity with trials by jury at law; and it is held that no question will be entertained as to the correctness of the instructions given by the court to the jury, because the feigned issue was directed only for the purpose of informing the conscience of the chancellor, and the cause was to be tried, and must be considered as tried, on the whole record, and is to be similarly tried on appeal. This case suggests, by antithesis, the case from the county court in Colorado, lately reported in the *Central*

Law Journal. We do not see it cited as presented in the briefs of counsel, though it would have been pertinent to the question raised in *Johnson v. Harman*. "In the case of — v. —, this court, sitting as a jury, has heard the evidence, and the court, as a court, has instructed the court, sitting as a jury, as to the law in the case. After due deliberation on the evidence and the instructions, the court, sitting as a jury, is obliged to announce that the jury cannot agree, and a new trial before another jury is consequently ordered." 4 C. L. J. p. 384 (April 20, 1877). This complete severance of the functions of court and jury, in cases where there is no jury, can no longer be tolerated, under the authority of *Johnson v. Harman*, *supra*.

The decision in the celebrated "Jumel will" case (reported in *Bowen v. Chase*, p. 814) closes this most interesting volume of reports, from which our limited space forbids any further citations.

P.

TENNESSEE CHANCERY REPORTS. Cases Argued in the Court of Chancery of the State of Tennessee, and Decided by the Hon. WILLIAM FRIERSON COOPER, Chancellor of the Seventh Chancery District, at Nashville. Vol. II. St. Louis: G. I. Jones & Co. 1877.

This handsome volume of 780 well-filled pages furnishes additional evidence of the propriety of the publication of this series of special reports—which the reviewer commented upon on the advent of the first volume—and is in itself a justification of the experiment. The success of the first volume, locally at least, was unqualified. No late volume of the reports of the supreme court of the state has been more warmly welcomed by the profession, more closely and profitably read, more often cited in court. A cursory examination of the second volume indicates that it will equal, if it does not indeed excel, its predecessor in the valuable character and quality of the judicial decisions which are here presented to the profession. This excellence and usefulness are not to be measured by state lines. Practitioners in other states than Tennessee may note some cases where the adjudication turns on principles of a purely legal character, applied here in a chancery court under the statutory extensions of the chancery jurisdiction peculiar to Tennessee. But these are merely exceptional cases, whose value is local. Nearly all the cases reported will prove of use to chancery lawyers in any state. We can do no more than make brief reference to

some points here decided, taking examples merely at random. A judgment at law upon a note secured by mortgage or trust deed does not merge the debt so as to bar or affect the right of foreclosure, nor is this right affected by the statutory limitation of actions at law for debt. *Harris v. Vaughn*, p. 483. Exceptions to the answer of a corporation under its corporate seal will not lie to its sufficiency as a discovery, and would be a useless form to its sufficiency as a pleading. *Smith v. St. Louis Mutual Life Insurance Company*, p. 599. Except by statute, no such practice is known in equity as making a person a defendant upon his own application, without the consent of the complainant. *Stretch v. Stretch*, p. 140. A bill clearly wanting in equity will be dismissed on demurrer, *mero motu* by the court, even if the causes of demurrer assigned are not technically sufficient to cover every ground of objection. *Knight v. Atkisson*, p. 384. Not only is mutual mistake a well-established ground of equitable relief, but so also is the mistake of one party only—even of the party applying for relief—if it be clearly proved. *Harding v. Egin*, p. 39. Exceptions to a master's report, based upon evidence in the cause, should be at once brought to the attention of the master, to be by him considered before they are presented to the court; and, a different practice having before obtained, the chancellor establishes the correct practice by a new general rule. *Gleaves v. Ferguson*, p. 389.

The question whether a mother has power to appoint a testamentary guardian for her children, which has been an open and troublesome one to the bar of Tennessee, and has not been frequently adjudicated in any of the states, is here resolved by the chancellor in the negative. *Ex parte*, Bell, p. 327.

Here is also a contribution to the current "sewing-machine law," in the case of *Howe Sewing Machine Company v. Zachary*, where the vendor of a machine—who, upon the theory that there was no valid sale, sued the vendee in replevin therefor and lost the suit, and suffered judgment therein for its value—was allowed to file a bill in chancery and set off his demand for the price of the machine against the judgment (p. 478).

But we could fill our pages with citations similarly interesting. Chancellor Cooper seems to have the happy faculty of gathering into his forum cases of special interest. Perhaps they are drawn in by the attraction of some natural magnetism which he possesses. This peculiarity was noticed in the first volume of the series of his reports. We find in this second volume a case where a young man

of full age and sound mind conveyed all his real estate in fee-simple to a lawyer, as his trustee, to hold the same for him, the ostensible object being to protect the inexperienced youth from "imposition at the hands of the designing," and the bill being filed to set aside mortgages made by the trustee, who had appropriated the money. *Harding v. St. Louis Life Insurance Company*, p. 465. Also a case arising on notes given for the conveyance of "the secret of a remedy for chills and fever," known as "Dr. Knaffle's chill pills." *Flippin v. Knaffle*, p. 238. Also a case brought by residents in the vicinity of Fisk University to restrain a theoretical and vaguely apprehended nuisance from sewerage on the lands of that institution (p. 587). And here is the case of *Benevolent Society No. 2 v. Benevolent Society No. 2*, p. 77, which presents a *grave* controversy between two societies—one composed wholly of colored males and the other of colored females—over the possession and use of a cemetery.

Williams v. Carson, p. 269, has been frequently adverted to as illustrating the humorous side of the staid chancellor's character. He here institutes a comparison between the law of *Hales v. Petit*, 1 Plowd. 253, and that of the grave-digger's scene in *Hamlet*, in similar manner to that employed by Lord Campbell in his "Shakespeare's Legal Acquirements Considered." Elsewhere in this volume he says, "exact logic is often too nice and refined for the practical business of life, when stretched 'upon the rack of this rough world,' and must give way to the clearly-expressed intention of parties" (p. 743).

At p. 98 he says, declining to assent to a certain theory of a case urged upon him by counsel, "the draft is somewhat too large upon our judicial credulity." And, at p. 190, referring to certain violations of an injunction in a pending case, he says, "they were winked at (not to put too fine a point upon it) by two of the solicitors of this court." It is pleasant to see a studious and erudite chancellor able to enliven the administration of equity with little flashes of native good-humor, and occasional evidences of general reading and culture. Even into the dry bones of *Jarndyce v. Jarndyce* a little life might be infused by the presence and example of such a chancellor.

The frequent notes in the first volume of this series which announced the affirmance of the chancellor's decree by the supreme court, on appeal, gave increased usefulness and value to the reports of the cases thus affirmed. This feature is continued

in the second volume, and it appears that ten of the chancellor's opinions here reported have already had the approval and affirmance of the supreme court. An appended note further informs us that, since the publication of the first volume, six of the cases there reported have been affirmed on appeal, and another has been reversed, while the principle announced in another case has since been elsewhere ratified and approved by the supreme court.

P.

TENNESSEE REPORTS. Cases Argued and Determined in the Supreme Court of Tennessee. By GEORGE S. YERGER. Vols. V, VI, and VII. A new Edition, with Notes and References by WILLIAM FRIERSON COOPER, Chancellor of the Seventh Chancery District. St. Louis: G. I. Jones & Co. 1877.

The merits and usefulness of this new annotated series of the early Tennessee Reports have been heretofore spoken of in these columns. It may suffice to say of the fifth and sixth volumes, lately issued, that they are fully up to the standard already established by the learned editor. The same carefulness and diligence in the annotations made are here evident, showing that the annotator has ransacked the Tennessee Reports, and has distributed, with scrupulous fidelity, in these reprints, the notes collected in years of private research. Typographical errors in the early edition are here corrected; and attention is frequently called to more serious defects, such as incomplete statements of facts, either in the first reporter's work or in the opinion of the court itself; and in one case in 5 Yerger we find a defective statement of the facts of the case in the original opinion evidenced and explained by a remark of the same judge in a later case, which is prudently cited by Judge Cooper in a note (p. 282).

In another instance, after correcting in a foot-note some obvious and almost inexcusable typographical errors, the editor modestly disavows any supposed criticism upon the court, and disarms any criticism upon his own motives, by subordinating his own views of the question to those of his "learned readers" (p. 188). Incorrect citations of authorities in the old edition are here corrected. Frequently the Tennessee lawyer finds in one of Judge Cooper's head-notes, in this revised edition, more material for his brief than he has been able to find in his own notes or in any digest. In short, we can hardly suggest any respect in which the usefulness of

this new edition of the reports, as an annotated edition, could be improved.

We make one citation, to show that the learned editor does not refrain from criticism of these ancient reports through fear. In 6 Yerg. 402, he appends this note to the case of *Baker v. King*: "This litigation originated in the sale of a horse for \$75. *King v. Baker*, 1 Yerg. 450. When it first came before the supreme court, that court, while remanding it for an issue, expressed the hope that the case might be adjusted without an expensive jury trial. It must be admitted that the court has not, in this decision, aided much in the realization of the hope."

These volumes are much smaller in compass than the average modern volume of reports, and are painfully suggestive of the thinness of some of the reprinted Wendell's Reports. Volume 5 contains but 391 pages, and volume 6 but 363 pages, of the reprint in reported cases. These are small volumes, the practitioner may urge who is called on to purchase them. We are reminded by their smallness that it was proposed, when the issue of this new series of reports was initiated, to bind together in one volume two of the reprinted Yergers, as was done with the earliest reports of the series; so that the ten Yergers might then have been cited as 5, 6, 7, 8, and 9 Tenn., instead of as at present. The two now before us might then have been reviewed in these pages under the title of 7 Tenn. Reports. But, unfortunately, no provision was made by any of the state authorities for such a condensation of the small, early volumes of the state reports, and the publishers could not well do otherwise than to reprint in separate volumes, as they have done. Not even at this day has Tennessee made any provision for having her state reports cited by the only proper title of "Tennessee Reports;" and her reports are still awkwardly designated only by the name of the reporter for the time being.

The reprint of the 7th of Yerger follows promptly the issuance of volumes 5 and 6, which are elsewhere noticed. The cases here reported were decided in 1834 and 1835, when the eminent John Catron was chief justice of the supreme court of Tennessee, and Nathan Green and Jacob Peck were his associates. This volume marks the close of what may be called the first era of Tennessee jurisprudence, under the earliest constitution, that of 1796. The succeeding volume will show some of the features of the transition

to the second era of that state's jurisprudence, which opens with the constitution of 1834, framed in some measure to avoid the effect of decisions on constitutional questions rendered prior thereto by Justice Catron and his associates.

These early opinions exhibit the rugged strength of intellect and decision of character peculiar to the times and localities of American pioneering. They frequently lack grace and beauty, but it is seldom that they have been found in serious variance from the well-settled principles of law.

Not the least valuable feature of the reports which are now being reprinted is the copious briefs with which they are embellished, from such distinguished counsel as R. J. Meigs, T. Washington, the Yergers (Geo. S. and J. S.), F. B. Fogg, J. J. White, A. M. Clayton, and E. H. Ewing. These briefs are frequently of more value to the profession, and more used by them, than the opinions of the court, and are often cited in argument as persuasive authority. Several such are found in the volume now before us. It is well that they are now perpetuated by a reprint. P.

NOTES ON THE CONSTITUTIONAL HISTORY OF THE UNITED STATES.

By KENNETH MCINTOSH, Counsellor at Law. Pittsburgh, Pa.: James Harry. 1877. For sale by G. I. Jones & Co., St. Louis.

This little volume comprises parts of a course of lectures delivered to the students of Westminster College, New Wilmington, Pa., which are now published at the request of the president, E. T. Jeffries, D. D.

In its twelve brief chapters is condensed a complete and masterly view of the early political history of our country and its constitutional growth, down to the present time, from a modern, and in some respects novel, point of view. The titles of the chapters are as follows: I. Provincial Colonial Legislation. II. Proprietary Colonial Legislation. III. Colonial Charter Governments. IV. Growth of a National Sentiment. V. Tripartite Division of Governmental Powers. VI. Two Chambers. VII. and VIII. Bill of Rights. IX. The Judiciary—Jay to Marshall. X. The Judiciary—Taney. XI. The Judiciary—Chase. XII. The Judiciary—Waite. The Federal Constitution and Amendments are embraced in an Appendix.

The above will give a fair impression of the nature and scope of the work, but the manner of treatment of the several subjects by the author must be examined more closely to be appreciated. A

few extracts will serve the reader's purpose better than a labored commentary. In speaking of the "growth of a national sentiment" (ch. 4, p. 58), the author says:

"A scheme of union had been formed in 1643 by four colonies; in 1754 by seven, in 1765 by nine, in 1774 by twelve, in 1775 by the thirteen colonies, and in 1781 the union had assumed the name of a confederation, but they had been reluctant unions.

"The Continental Congress represented the broken, disjointed parts of what was destined to be one nation. It was an assembly of ambassadors from the states which obeyed its requisitions on account of the common danger from the invading enemy. * * *

"As early as 1781 the articles of confederation were adopted, forming '*a perpetual union*' of the states, but giving to the general government only power to make requisitions on the states for the money needed to carry on the government.

"The confederation was not a union of '*the people*,' but of the colonies—the states. The people of the colonial corporations, or thirteen original states, grew up with a love for their own local laws and institutions, and a jealousy of all foreign dominion. The hostility toward Britain was charged to dread of federal rule, and every power given to the general government was delegated as a necessity for common defence and general welfare."

After describing the jealousy and want of unity among the states, he quotes Washington: "The constitution is the result of a spirit of amity, of deference, of mutual concessions, that our situation imperatively demanded." The various compromises and "mutual concessions" are noted at some length, and the tenets of the two great parties who contended for the representation of their respective ideas in its construction are well and fairly stated. The "secession speech" of Josiah Quincy, of Massachusetts, in Congress, upon the admission of Louisiana, is quoted and commented on. The states' rights controversy is carefully reviewed. The late war and its results are discussed with cool judgment and impartial justice. And the extra-constitutional legislation during and since the war is held up to view in all its deformity.

"The 'irrepressible conflict' went on, and to arms was the last resort. Then came the three amendments that have in them no elements of compromise and accommodation. Bold, sweeping, comprehensive, impartial; they embody the fruits of the conflict, are hostile to rebellion and destructive to slavery; state rights no longer cherished and slavery no longer defended, but these ele

ments of discord swept away, and the omnipotence of Congress held in check by almost nothing but the restraint of the powers of the Supreme Court.

“With a liberal construction of the fourteenth amendment to the constitution, we might have the Federal courts adjudicating local affairs, and might soon lament, because the nation’s victory was a victory over ourselves, and Congress, in legislating for the enemy, had swept away our local independence.” And the chapter concludes: “We are justly proud of the union, and we glory in the strength of the nation, but let us ever be vigilant and jealous of the rights of individuals and localities, hostile to every act of injustice to any man; then we shall do our part toward making national unity a blessing, and not a curse.” To which we say, “Amen!”

A TREATISE ON THE LAW OF TAXATION AS IMPOSED BY STATES AND THEIR MUNICIPALITIES OR OTHER SUBDIVISIONS, AND AS EXERCISED BY THE GOVERNMENT OF THE UNITED STATES; PARTICULARLY IN THE CUSTOMS AND INTERNAL REVENUE. By W. H. BURROUGHS. New York: Baker, Voorhis & Co. 1877.

It never rains but it pours. A few months ago we had no book on taxation except Mr. Blackwell’s celebrated volume on Tax Titles. Then came Mr. Hilliard’s work on Taxation, and just on its heels that of Judge Cooley. Now we have a third treatise on the same subject, larger, more extensive, and more elaborate than either of its predecessors. The amount of labor involved in the preparation of this last production sufficiently indicates that it must have been on the stocks long before the announcement of the preceding volumes by Hilliard and Cooley. There is nothing in the work of Mr. Hilliard to warn off any other writer from the same field of labor. It is a mere collection of head-notes strung on certain strings called chapters. But any work of Judge Cooley is quite a different thing; he not only sees the law, but he sees through it. In his hands the opaque mass becomes transparent. He has not only a clear conception of legal principles, he has also a clear way of showing them forth to others. His work on Taxation answered all the demands of the profession, fulfilling, as it did, all the conditions of a thoroughly good book. On its appearance, Judge Burroughs—if he is any way human—must have been alarmed for his anticipated laurels. The continent was not only discovered, but it had been accurately mapped out. Not to give up under these circumstances showed rather a rare courage, either

in kind or degree. To enlarge the plan, to explore its details with a more exhausting search—such were the only terms on which success could be even hoped for. How far the author may be indebted to the preceding works that we have mentioned would be an idle and unprofitable speculation; for, in our view of his labors, it must be conceded that he has himself sought the fountain heads, not relying on reports of any exploring parties whatever.

Any one having a due respect for labor painfully and conscientiously performed, presided over by unusual skill, wisdom, and ability, accomplished, too, partly under discouraging circumstances, will have a due appreciation of the present work. It is proper to say that our author has a style not quite so harmonious and pleasing as that of Judge Cooley, who, among our law writers, has hardly a rival in that respect; but, nevertheless, he is always clear, and his style possesses all the ordinary virtues of a good style, and, in the matter of patient and prolonged industry, he has, perhaps, been hardly excelled. Comparisons are odious; and we should not like to have to choose between the rival works of Cooley and Burroughs, each of which has merits peculiarly its own. We have got to be a taxed people; and, as we need books to show how far we are vulnerable in that way, we regard both books as being well-nigh indispensable to the practising lawyer, and no less indispensable to the judge who, for want of knowledge of this intricate branch of the law, is liable to go astray notwithstanding the common-law maxim, which certainly does no injustice to even the high qualifications of all incumbents of the bench.

This volume devotes 200 pages to Federal taxation, customs, and internal revenue; questions intricate and troublesome enough, and which are nowhere else treated with such thoroughness. We do not hesitate to say these 200 pages are of themselves worth the price of the book—which, as a whole, we can cordially recommend to the profession without misgivings. The author has most carefully examined his authorities, taking nothing on trust, and the result of his labors is eminently satisfactory. It is, indeed, a monument of patient, faithful, and well-directed labor. It is not often that we find a law-book of which so much that is favorable can conscientiously be said.

CHASE'S BLACKSTONE.—Messrs. Banks & Brothers, New York and Albany, have published an abridgment of Blackstone's Com-

mentaries, made by George Chase, Assistant Professor of Municipal Law in the Law School of Columbia College. It is all contained in one volume of 1,046 pages, of about the size of Sharswood's and Cooley's Blackstone, and the abridgment is made by striking out such portions of the original text as have become obsolete; the local and political matter of book I and books III and IV have been considerably curtailed. Additions are also made in regard to some matters insufficiently treated by Blackstone, and, in order to preserve the original text of the author in his own language, they are inserted as notes. Among these additions we notice, with pleasure, Broom & Hadley's short treatise upon *servitudes*, given in connection with Blackstone's imperfect chapter upon incorporeal hereditaments, and which far more than supplies the place of what he says relating to advowsons, tithes, offices, dignities, corodies a pensions, all of which is omitted, as not belonging to our system. The editor might as well, for the same reason, have dropped what the author says in regard to commons, as being of little other than historic value. Three or four pages are inserted concerning fixtures, an important matter of which Blackstone neglects to speak. The law of landlord and tenant and the law of bailment are also enlarged upon. The original pages of books I and II are preserved, but the changes in books III and IV are such that the old paging is dropped, and we have only that of the abridgment.

The object of the editor would seem to be to give us, as it were, an American Blackstone. Broom & Hadley and Kerr have brought down the text of the author to the law as it now exists in England; but there is much of practical value in the mother country, as showing a municipal system still in force, that with us only interests the student of the history of our jurisprudence. Most of this has been struck out by Mr. Chase.

There is a difference of opinion as to the propriety of requiring the student to spend any portion of his time in studying obsolete or foreign law. Some think that he should understand the historical roots of our system, that he should trace the law's progress to its present state of development, while others regard it as sufficient to know the law as it is. The latter will like such labors as those of Mr. Chase, while the former will prefer the original Blackstone, with such annotators as Chitty, Sharswood, and Cooley. An able, but rather rough, lawyer of central Missouri was once asked by a law student what parts of Blackstone he had better omit

in his reading. "Omit nothing," he replied. "But would you," said he, "have me spend my time in reading it all? They say that a good deal of it is not law in Missouri." "Yes," answered the old lawyer, "read every d—d word of it." Not getting much consolation in regard to Blackstone, he asked him what book he would advise him to read next. "Read it over again, appendix and all; spend all winter on it, and, when you know it by heart, read Kent in the same way." This lawyer would probably not value such abridgments as that of Mr. Chase; but, still, there are many who would confine their readings to what is of present, practical use, who would not trouble themselves about the roots of the law if they could find what it is now held to be. Such will prefer the proper abridgment, and to them it is commended. B.

A TREATISE ON THE LAW OF CARRIERS BY LAND AND WATER.
By JOSEPH K. ANGELL. Fifth Edition. Revised, Corrected, and
Enlarged by JOHN LATHROP, of the Boston Bar. Boston:
Little, Brown, and Company. 1877.

It is not too late to call attention to this edition of an old and justly popular work, but it is too late to bestow any special commendation upon it. The profession did that long ago, and there is none to move in arrest of that judgment. The text of few books written twenty-eight years ago will be found to be so generally supported by the uniform current of authority since. This is owing largely to two facts—that the text was carefully considered, and that the changes in the law of carriers have been comparatively insignificant. In saying that, however, we do not wish to be understood as saying that the decisions during that period do not deal with important and novel questions. During the time that this book has been before the public the carrying trade has undergone a complete revolution, and has assumed proportions the magnitude of which was not even dreamed of when the foundations of the law of carriers were laid. Yet so enduring, so wise and just, were the rules of the common law that they have proven amply sufficient to meet the requirements of this great change. In some instances local courts have mistaken, or sought to improve, these rules in some particulars; but such courts have, generally, sooner or later, renewed their fealty to the old and time-tried doctrines. It is true that, in some of the states where it has of late years become the fashion to make liberal expenditures of borrowed capital, the day of payment now being at hand, the strict but just

rules of the common law are thought not to be sufficiently hostile to the common enemy, capital, and other rules have been evolved from the prejudice of excited grangers rather than the experience which is generally conceded to be necessary to regulate any important business wisely and well. This mania is comparatively local, and will not, probably, extend much further. Grangerism is a disease which contains a remedy within itself. It is only seriously hurtful to those who become infected with it.

When this era of agrarianism, cheap money, cheap morals, cheap men, and general cheapness is remembered only as a disagreeable experience through which the people of this country have happily passed, the essential principles of the common law of carriers will still be regarded with admiration, and will, we trust, be more efficiently enforced.

It is probably true that the great corporations which now enjoy a practical monopoly of the carrying business have, by their extortions and open defiance of the rights of the public, brought upon themselves a retribution not wholly undeserved, but, still, none the less inimical to the best interests of all concerned.

The editor has done his work with more than ordinary care and discrimination. He has not attempted to supplement the text with a digest of the decisions on the law of carriers, but has selected out of the immense mass at his command 500 cases illustrating the current of authority on controverted questions and points of special importance or novelty. The publishers have issued the work in a form that leaves little room for improvement.

M. A. L.

VOID EXECUTION, JUDICIAL AND PROBATE SALES. By A. C. FREEMAN, Author of Treatises on "Judgments," "Executions," "Co-tenancy and Partition," etc. St. Louis: The Central Law Journal. 1877.

We welcome the returning day of monographs and small law-books. Very many special topics may be treated, with great convenience and satisfaction to the profession, within small limits; and we are long since tired of purchasing books of full, or even half, size that are padded for the express purpose of securing larger prices than the books deserve. Mr. Freeman has given a very full treatise on the subject of Void Judicial Sales within the compass of 120 pages, thus furnishing a monograph slightly larger than most of those which have lately appeared. The necessities of his subject have led the author into some illustrations of the

requisites of valid judicial sales; and the work will be found of as great and common use as many larger and more imposing works. A glance at the table of contents will show this. The chapters, after the introduction, are entitled as follows: II. Sales void because the court had no authority to enter the judgment or order of sale. III. Sales void because of errors or omissions subsequent to the judgment or order of sale. IV. The confirmation and deed. V. The legal and equitable rights of purchasers at void sales. VI. The constitutionality of curative statutes. VII. Constitutionality of special statutes authorizing involuntary sales.

These subjects are treated with considerable fullness. References are made to over 600 cases; and, while these are generally mere statements of points decided, after the manner of a digest, yet, in several instances, copious extracts from judicial opinions are given, illustrative of the subject treated.

We note a *lapsus* in the failure to note, in the table of contents, the paging of the several chapters, which will require those who use it to add the paging for themselves.

A TREATISE ON THE LAW OF WATERCOURSES: With an Appendix Containing Statutes of Flowing and Forms of Declarations. By JOSEPH K. ANGELL. Seventh Edition. Revised and very much Enlarged by the Addition of New Matter to the Text and Notes, by J. C. PERKINS, LL. D. Boston: Little, Brown, and Company. 1877.

This new edition of a well-known standard work will commend itself to the favorable consideration of the profession. Of all the books of Mr. Angell this has always seemed to us to be the best. An unusually timid writer, never, or at least very rarely, venturing anything beyond the very letter of the decided cases, he was painstaking almost to a fault; gathering and arranging his cases as an entomologist might collect and arrange his specimens, regarding the law apparently as a science of statutes and decisions purely, which were to be noted simply as natural phenomena are noted. The capacity and methods of Mr. Perkins as an editor are well known; no one stands higher. He has added a large amount of new matter, which is appropriately distinguished from the former text, and has cited all the later cases. The lawyer will find the volume interesting and useful. It being the only approved work on the subject, it might be said to be indispensable to any one having occasion to examine the department of law of which it treats.

SYSTEM OF SHAKESPEARE'S DRAMAS. By DENTON J. SNIDER. Two volumes. St. Louis: G. I. Jones & Co. 1877.

This is the modest-title page of a work just laid on our table. The subject of the book is foreign to the purposes of this REVIEW, and we cannot here speak of its merits as a literary work, though we have a great respect for Professor Snider; but the mechanical execution of the book, type, paper, and press-work, is so meritorious as to command a word of praise. We do not exaggerate when we say that the book, in these respects, deserves place alongside the finer products of the Riverside Press. This book, and sundry volumes of reports and text-books which we have seen from the press of Messrs. Jones and Company, warrant the statement that the country, east or west, has no book-printers better than those of St. Louis.

THE BANKRUPT ACT. Third Edition. Compiled, with Notes and Index, by NATHAN FRANK, Esq., of the St. Louis Bar. St. Louis: Central Law Journal. 1877.

For daily reference by lawyers, merchants, and others concerned in the administration of the bankrupt law, this is the most convenient edition we have seen.

Mr. Frank's work is, in the main, well done. His notes are brief, apt, and helpful. The text of the law is set forth very clearly, and the leading cases are cited. It does not aspire to be a text-book, like the admirable work of Mr. Bump, but is likely to be oftener used. A few errors have escaped the notice of the proof-reader, but the typographical arrangement and the press-work are of an excellent quality. St. Louis is now furnishing some of the very best legal printing done in the United States.

THE LAW OF PARTNERSHIP.—Messrs. Morrison, of Washington City, have published a short treatise upon the Law of Partnership, written by Professor Tyler, of the Law Department of the Columbian University. It is a well-printed 8vo. book, of about 150 pages, and contains an outline of its subject in clear and plain language, without references, and is designed chiefly for law students, and those desiring a general knowledge of the subject and who are not engaged in the practice. On looking hastily through its pages we discover no errors in point of law, and believe it will be a useful book for those for whom it seems to have been written.

B.

VII. NOTES.

THE BANKRUPT LAW.—It seems more than probable that this law will be—as it ought to be—retained in force. We hope, however, that the friends of the act will see to it that it receives some material modifications. The absence of nearly all restriction on the discharge of involuntary bankrupts, and the cumbrous machinery for compulsory proceedings, demand attention. In the main, the act should be for the benefit of the creditor class. Since the amendment of June 22, 1874, however—passed by a Congress professedly hostile to the act—it has been almost wholly a debtor's relief act. Reform it altogether in this regard.

SIR J. F. STEPHEN'S two papers in the *Nineteenth Century*—one "The Reform of the Law by Private Enterprise," the other, "Suggestions as to the Reform of the Criminal Law"—have attracted much and deserved attention. We cordially commend them to those interested in the subjects of Reform and Codification as most hopeful and helpful efforts in the right direction. Both papers are long, full, and able. We should republish them in this REVIEW if space permitted, but we have to content ourselves with saying that copies of the *Nineteenth Century* containing the articles can be had of any newsdealer, or, in default of that, of the publishers of this REVIEW. We are for reform in some departments of the law, at least, and we shall speak of this more in detail on a future occasion.

ROPER'S CASE.—The election-fraud cases in this city have terminated in the acquittal of the accused. We have no space to comment on the particulars of the trial, but we cannot forego a bare statement of the facts. One Roper, charged with committing outrageous ballot-stuffing, *CONFESSED the crime in full and in detail*. He was tried, eminent counsel assisting in the prosecution, and *ACQUITTED* by order of the court. Something is rotten in the state of Denmark when such things are. *The criminal law of this state is fatally defective, OR ITS ADMINISTRATION IS A FARCE*. We incline to the latter opinion. There is no sense in mincing words over this matter. The immediate fruit of such exhibitions of the imbecility of the criminal courts is the growth of a feeling among the best, as well as all other, classes in the community that lynch law is, after all, better in many respects than what we have administered in our criminal courts.

TRIAL BY JURY.—In civil cases the uncertainty and injustice of the verdicts of juries are an ever fresh source of irritation and disgust to a careful and conscientious practitioner. Selected as most of our juries are, it is

hopeless to expect that they will be wholly free from bias or unreasoning sympathies, or even capable of comprehending a series of complicated facts, or of justly weighing conflicting evidence. It is to be hoped, for the sake of speedier trials, the discouragement of speculative litigation, and the reduction of expenses, that measures looking to the very general substitution of a bench of, say, three learned, able, and experienced judges, as triers of fact, in lieu of a jury, will be generally adopted. A late act in Missouri gives to cases in equity, and jury-waived cases, a preference in the time and order of trial, but though intended, no doubt, to expedite proceedings and encourage the substitution of trial by court for trial by jury, it is questionable whether, in the very class of cases in which the remedy is most needed, the opposite result will not follow. Juries will seldom be waived in cases where delay is sought, or where confidence in the justice of his cause is lacking in either the litigant or his attorney.

JOHNSON v. CASS COUNTY.—The recent decision of the Supreme Court of the United States in this case has caused much comment, excited and calm, in Missouri. The question involved was the validity of the act authorizing townships in Missouri to issue bonds for certain purposes. Enormous amounts of these bonds, passing into the millions, had been issued, and, as they bore a high rate of interest, were much sought for as an investment. In *Harshman v. Bates County* the Supreme Court of the United States accepted, apparently without mature consideration, the point therein raised—that the act authorizing the issue of these bonds had departed materially from the constitutional provision which forbade the general assembly to authorize any municipality to loan its credit “unless two-thirds of the qualified voters” thereof assented thereto. The act in question followed this limitation, but added, “voting at such election.” The whole question to be decided was whether this last phrase differed in meaning from the clause of the constitution. In *Johnson v. Cass County*, the Supreme Court, following a long line of Missouri precedents, hold that the “qualified voters” are those who *vote*, not all those in the municipality who have the legal right to vote on the day of the election. It is shown with great clearness that no other test can be known to the court than the votes cast. Any other test would be fallacious and impracticable. The argument seems to us impregnable, and outside of Missouri it will be so regarded. In localities infected by the loathsome disease of repudiation, of course the decision is savagely criticised. Repudiators generally are disgusted. But lovers of honesty and fair dealing, lawyers who recognize that courts are to seek industriously ever to maintain public credit and to uphold contracts made in good faith for valuable considerations, rejoice that the highest court in the country was not lacking in the courage to reverse a hasty and ill-considered decision of its own. When the wave has passed, the only wonder will be how the first decision came to be made.

VIII. DIGEST IN BRIEF OF RECENT CASES

REPORTED IN FULL IN THE LAW JOURNALS SINCE LAST ISSUE.

PREPARED BY S. OBERMEYER, ESQ., OF THE ST. LOUIS BAR.

[The object of this department of the REVIEW is to advise our subscribers of points decided in the latest reported cases, and to show where they can obtain, at very small expense, full reports of cases in which they have an interest. To this end the points decided are briefly and pointedly given, with the abbreviation and date of the journal where the case is reported in full. The price of single numbers of each journal is also given, which, remitted to the address given, will secure a copy of any desired issue.]

NAME.	ABBREVIATION.	ADDRESS.	PUBLISHED.	PRICE.
Albany Law Journal.	Alb. L. J.	Albany, N. Y.	Weekly.	15 cents.
American Law Register.	Am. L. Reg.	Philadelphia, Pa.	Monthly.	50 cents.
Central Law Journal.	C. L. J.	St. Louis, Mo.	Weekly.	50 cents.
Chicago Legal News.	C. L. N.	Chicago, Ill.	Weekly.	10 cents.
National Bankruptcy Register Reports. }	N. B. R.	New York.	Semi-monthly.	50 cents.
Weekly Notes of Cases.	W. N. C.	Philadelphia, Pa.	Weekly.	20 cents.
Western Jurist.	West. Jur.	Des Moines, Ia.	Monthly.	50 cents.

ADMIRALTY.—*On motion for an attachment for contempt.*—A court of admiralty may compel a buyer at a judicial sale to complete his purchase by payment of the money; An irregularity in the marshal failing to make return of his writ with report of his doings thereon is healed by an order confirming the sale; An order to pay money into court, served upon a purchaser in default, is sufficient, though his name be not mentioned in the order; A proctor may be personally held for his bid if it be not known to the marshal for whom he is acting; The words "her boats, tackle, apparel, and furniture," used in the writ and published notices of sale, imply no warranty of a complete outfit, nor even that all the property that once belonged to the vessel is in possession of the marshal, especially where he sells her "as she lies."
—The *Kate Williams*, U. S. Dis. Ct., E. D. Mich., C. L. N., Sept. 15, p. 426.

—*On exception of Martin Bogle to the clerk's report classifying claims.*—In the distribution of proceeds of sale, claims for towage and necessaries are entitled to rank those for breaches of contract of affreightment.—The *Unadilla*, U. S. Dis. Ct., E. D. Mich., C. L. N., Sept. 15, p. 427.

—*Amendment of libel—Discharge of surety—Taking collateral security—Stay of suit—Discharge of surety.*—The amendment of a libel by adding the name of a new party as co-libellant does not operate to discharge the surety upon the stipulation; Where, after commencement of suit and the seizure and bonding of the vessel, libellants took the notes and mortgage of the owner, payable at different times within six months, as collateral security to their claim, *held*, that the suit was not thereby arrested nor stayed, nor the surety discharged.—The *Maggie Jones*, U. S. Dis. Ct., E. D. Mich., C. L. J., Sept. 21, p. 263.

—*Bill of lading—Priority of lien.*—Bills of lading becoming operative upon delivery to vessel of the property to be shipped, and mentioned in the bills.—*Burkam v. Schooner L. J. Farwell*, U. S. Dis. Ct., E. D. Wis., C. L. N., Sept. 29, p. 9.

ADMIRALTY—Continued.

— *On libel for seaman's wages.*—Where a Canadian vessel is in custody of the marshal, upon a claim made by an American citizen, the court will take jurisdiction of an intervening libel filed by one of the seamen, notwithstanding his contract is made and performed in Canada, and all the parties are British subjects; As the lien of the seaman exists by the general maritime law, the courts of this country will enforce such a lien arising in Canada, notwithstanding the absence of admiralty courts there; There is no lien for services as ship-keeper while the vessel is laid up during the winter; Where a party shipped as seaman in the spring, served as such during the season of navigation, and then remained on board during the winter, keeping the ship, *held*, that he could recover as seaman only for his services during the season of navigation, though no new contract was made.—*The Champion*, U. S. Dis. Ct., E. D. Mich., C. L. N., Sept. 29, p. 10.

— *Freight, in case of wreck*, is payable on each cask of sugar landed, provided a quantity equal in value to the stipulated freight remains in the cask; Expense of transshipment to port of destination, under the circumstances of this case, is a charge upon freight alone; Expense incurred in bringing a vessel into port, after separation of cargo, is a charge on the vessel alone.—*Smith v. Welsh*, U. S. Dis. Ct., E. D. Pa., W. N. C., Nov. 1, p. 383.

ATTORNEY AND CLIENT.—*Attorneys' fees—Lien for—Enforced—How.*—The duty of the courts is to declare a lien for attorneys' fees where the amount of the fee is not fixed by contract, and parties are under no disability, and leave the attorney to enforce this lien by appropriate proceedings in a court having jurisdiction of the question.—*Steel v. Chester*, Sup. Ct. Tenn., C. L. N., Oct. 6, p. 20.

BANKRUPTCY.—*Assets—Determination of character of—Whether belonging to partnership or individual estate—When assignee may appeal.*—The bankrupt law does not prescribe any rule or furnish any method for ascertaining the character of distributable assets; That is a subject of preliminary judicial inquiry, to be determined by legal principles of recognized controlling applicability; As to the questions touching the tenure of real estate, the Federal courts are to be governed by the laws and decisions of local tribunals of the country where such real estate is situated; Where real estate has been held by partners as tenants in common, the classification thereof as partnership assets, in the schedule filed by them, will not change the nature of the title to the prejudice of the rights of separate creditors; An appeal to the circuit court is allowed only upon final decrees of the district court in a suit in equity, by or against an assignee, where the sum in controversy exceeds \$500.—*In re Zug & Co.*, U. S. Cir. Ct., W. D. Pa., N. B. R., Oct. 1, p. 280.

— *Assignee—Contest between him and partner of bankrupt.*—In a contest between the assignee and third parties to ascertain their respective rights as to real estate which had been purchased by the bankrupt and such parties, under an agreement to furnish the outlay and share in the profit and loss equally, it is necessary to adjust the partnership dealings to the time of the commencement of the proceedings in bankruptcy, and ascertain the exact interest of the bankrupt and each of his partners in such transaction; Where there are partnership debts still outstanding, on which the bankrupt's partner is liable, such partner is entitled to a lien upon such real estate until the debts are paid, and to indemnify him in case he is compelled to pay them.—*Thrall v. Crampton*, Assignee, U. S. Dis. Ct., D. Vt., N. B. R., Oct. 1, p. 261.

— *Assignee—Death of—His successor must be made party to foreclosure proceedings.*—Where the former assignee of the bankrupt, a second mortgagee, was made a party defendant in a suit to foreclose the first mortgage, and died after entry of a decree *pro confesso*, but before final decree, and his successor is not made a party to the suit, a sale will not affect the second mort-

BANKRUPTCY—Continued.

gage, and the assignee will be permitted to redeem.—*Avery, Assignee v. Ryerson*, Sup. Ct. Mich., N. B. R., Oct. 15, p. 289.

—*Assignee—May proceed by summary petition, when.*—An assignee may petition summarily to set aside a mortgage given after the commencement of proceedings in bankruptcy. Resort to a bill in equity is unnecessary.—*In re Stephen Sims*, U. S. Dis. Ct., D. Mich., N. B. R., Oct. 1, p. 251.

—*Assignee—Suit by, to recover assets of bankrupt—Knowledge of creditor as to insolvency of debtor.*—A creditor may be said to have had reasonable cause to believe that his debtor was insolvent, where the fact of insolvency actually existed, when such a state of facts is brought to his notice respecting the affairs and pecuniary condition of his debtor as would lead a prudent man to the conclusion that the debtor is unable to meet his obligations as they mature in the ordinary course of his business. Assignees may sue to recover the assets of the bankrupt in the circuit or district court of a district other than that in which the decree in bankruptcy was entered. In calculating the time a preference must stand in order to be valid, the day the petition was filed must be excluded.—*Dutcher v. Wright, Assignee*, U. S. Sup. Ct., N. B. R., Oct. 15, p. 331.

—*Assignee—Suit by, to recover property fraudulently conveyed by bankrupt.*—Where two partners had a large amount of property, which they failed to account for after they became bankrupts, and their wives had money and property which was not shown to come from third parties, and after the bankruptcy, the husbands carried on business as the professed agents of their wives, held, that the bankrupts must pay over the value of the property so secreted.—*In re P. Peltasohn et al.*, U. S. Cir. Ct., E. D. Mo., C. L. N., Sept. 29, p. 10; s. c., N. B. R., Oct. 1, p. 265; s. c. (with note), C. L. J., Oct. 1, p. 311.

—*Assignee—What will pass to him as such—Bankrupt may purchase assets of his estate, when—Property of bankrupt in foreign state.*—A claim in favor of the bankrupt against the government will pass to his assignee: A description in the schedule of assets of a claim for the burning of cotton in the enemy's country during the war, as against the officers who destroyed the same, is substantially a statement that the claim is one against the government; Where a claim is marked in the schedule as worthless, the validity of a sale of the assets, including such claim, is not affected by its afterwards becoming valuable; A bankrupt who has received his final discharge is entitled to his future acquisitions, and may use them to purchase his former assets on a sale thereof by the assignee; The bankrupt court has no jurisdiction over property of the bankrupt in foreign countries, and cannot compel an assignment thereof by him.—*Phelps v. McDonald et al.*, Sup. Ct. D. C., N. B. R., Sept. 15, p. 217.

—*Assignee—Will not take income of trust moneys in which wife and children of bankrupt, as well as the latter, have an interest.*—Where the income of trust moneys is to be paid to the bankrupt during his life, to be applied to the support of himself and wife, and the education and support of their children, the trust declaring that the principal and income should be inalienable, the bankrupt takes it as sub-trustee, and is bound to apply it to the purposes named, and therefore it will not, upon his bankruptcy, pass to the assignee; The court cannot apportion such income and give the assignee an aliquot share.—*Durant, Assignee, v. Massachusetts Hospital Life Ins. Co.*, U. S. Dis. Ct., D. Mass., N. B. R., Oct. 15, p. 324.

—*Assignment for benefit of creditors—Allowance of disbursements of assignee when insolvent is adjudged a bankrupt.*—Where an insolvent, who has made a general assignment for the benefit of creditors, is afterwards adjudged a bankrupt, the assignee under the assignment is entitled to his disbursements legitimately made in the execution of his trust, but is not entitled to priority as to his compensation as such assignee, nor as to attorneys' fees incurred in

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Connection with the assignment; As to such items he stands in the same position as other creditors, and must prove his claim.—*In re George Lains*, U. S. Dis. Ct., D. Minn., N. B. R., Sep. 1, p. 168; *s. c.*, Am. L. Rec., Nov., p. 266.

— Assignment for benefit of creditors—Effect of delay of three months in filing petition in bankruptcy.—Delivery of schedules is not necessary to the validity of an assignment for the benefit of creditors; A delay of more than three months in filing the petition in bankruptcy, after the execution and delivery of an assignment for the benefit of creditors, will deprive the assignee in bankruptcy of the right to the possession of the property assigned.—*In re Kimball*, Austin & Co., U. S. Dis. Ct., W. D. Mich., N. B. R., Sept. 1, p. 188.

— Assignment for the benefit of creditors—Not affected by judgment subsequently rendered—Effect of bankruptcy proceedings upon assignment.—A judgment recovered after the making of a general assignment for the benefit of creditors, without preference, and valid by the laws of the state where it is made, creates no cloud upon the title to property transferred by the assignment, although such assignment be subsequently set aside upon the application of an assignee in bankruptcy; Until a general assignment for the benefit of creditors has been set aside, the title to property embraced in it remains in the assignee; It does not vest in the assignee in bankruptcy by the mere force of an adjudication and his appointment as assignee.—*Belden*, Assignee, v. *Smith et al.*, U. S. Dis. Ct., S. D. N. Y., N. B. R., Oct. 15, p. 302.

— Assignment—When not fraudulent.—In North Carolina a bond for title, given on an executory contract for the purchase of lands, conveys an equitable estate in the land to the vendee, which is assignable; An assignment of such estate to indemnify sureties, made without intent to delay or defraud creditors, is valid, and the assignee is entitled to priority over judgment creditors of the assignor; Such assignment is valid although no money is paid; The debt upon which the sureties are liable furnishes a sufficient consideration to support it; It need not be registered to be available against creditors, unless the time limited by statute for the registration of the bond has expired; Where the principal on a debt is insolvent, the sureties, in respect to their liability, are regarded in equity as creditors, and may retain any funds of the principal in their hands, even against an assignee for value without notice; An interest in lands acquired at an administrator's sale, where the administrator has not made title, is assignable; and such assignment need not be registered, under the laws of North Carolina, in order to be valid against creditors; Such equitable interest is liable to the liens of judgment creditors, subject to the equities of a surety of the debtor who holds a prior assignment thereof as indemnity for his liability.—*In re Wm. P. Reynolds*, U. S. Dis. Ct., W. D. N. C., N. B. R., Sept. 1, p. 153.

— Bankrupt—Examination of—Absence from examination may prevent discharge.—Where a bankrupt has been ordered to submit himself to further examination, a departure from the district before the time appointed, without examination, is such a violation of the order that no discharge will be granted until it is rectified by submission to such examination.—*In re Kingsley*, U. S. Dis. Ct., D. Vt., N. B. R., Oct. 15, p. 301.

— Bankrupt—Who may take benefit of the act.—A bankrupt engaged in farming and trading live stock is not a tradesman within the meaning of sec. 5110 of the Rev. Stat. U. S.—*In re Ragsdale*, U. S. Dis. Ct., D. Ind., N. B. R., Sept. 15, p. 215.

— Conversion—Action for, against marshal who has taken property lawfully held by sheriff.—Where the marshal has demanded of, and received from, a sheriff property which the latter holds under an execution levy, and delivers the same to the assignee, an action for a wrongful taking and conversion cannot be maintained by the judgment creditor against the assignee; Such

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an action cannot be maintained in a state court as an enforcement of a lien upon the funds in the hands of the assignee acquired by virtue of the judgment; Such lien can only be enforced in the bankrupt court.—*Ansonia, etc., Co. v. Pratt*, N. Y. Sup. Ct., N. B. R., Sept. 1, p. 170.

— *Composition—Effect as to secured claims.*—A composition at 25 cents on the dollar was effected under sec. 17 of the act of June 22, 1874 (Vol. 18, Stat. at Large, part 3, p. 178); In the statement of liabilities presented to creditors' meeting, plaintiff's claim was represented as fully secured by deed of trust on real estate worth more than the amount of the debt; Plaintiff, being also an unsecured creditor, attended the composition meeting, but did not in any way participate in it, nor dissent from the representation there made as to the value of his security; Long after the composition had been recorded and carried out by the debtors, plaintiff sold the real estate under the deed of trust, and a large deficit was left unpaid; In an action to recover such deficit, *held*, (1) the composition did not, *per se*, extinguish plaintiff's claim, but that he was entitled to 25 per cent. of final deficit, no matter when ascertained; (2) *Quære*, whether this result would have been changed, even if, in the course of the composition proceedings, the bankruptcy court, at the instance of all the parties, had caused the security to be appraised, and had decided it to be ample to cover the debt.—*Paret v. Ticknor*, U. S. Cir. Ct., E. D. Mo., C. L. J., Oct. 12, p. 328; *s. c.*, N. B. R., Oct. 15, p. 315.

— *Composition—Effect of payment of debt of one creditor after release obtained from all.*—Where an insolvent has been legally released from his obligations by a composition with his creditors, the debt of one of such creditors, who accepted the composition on the written condition that none of the other creditors should receive better terms, is not revived by the payment by the insolvent, after such release, of additional sums to other creditors.—*In re Sturgis et al.*, U. S. Dis. Ct., N. D. Ill., N. B. R., Oct. 15, p. 804; *s. c.*, C. L. N., Oct. 20, p. 88.

— *Composition—Payment of composition notes.*—Where notes given upon a composition settlement fall due pending action upon a petition to review the order of confirmation, and the petitioners refuse to receive payment, the money must be paid into court in order to absolve the bankrupt from liability; Under such circumstances, upon a subsequent demand of payment by the creditor, and refusal by the bankrupt, the former is entitled to a summary order for payment.—*In re Alfred P. Reynolds*, U. S. Dis. Ct., S. D. N. Y., N. B. R., Sept. 1, p. 176.

— *Composition—Proceedings on setting same aside—Creditors—Assignment—Vacation on adjudication.*—When a composition has been recorded, and part of the creditors have received their percentage, and a petition is brought, under sec. 17, of ch. 390, of the act of 1874, to set the same aside, notice thereof should be given to the creditors as well as the debtor; If in such a case the composition has been set aside, creditors who have received their percentage may retain the same, but have no right to vote for assignee; And the assignment may be framed to protect all lawful acts done, or titles acquired under and by virtue of the composition; When the creditors have been heard upon the merits of the question, it is not necessary to vacate the adjudication for a defect of notice, if a new decree of the same sort would follow.—*In re Bradt*, U. S. Dis. Ct., D. Mass., C. L. J., Sept. 28, p. 281; *s. c.*, N. B. R., Oct. 15, p. 820.

— *Discharge—Consent of creditors—Creditors before 1869.*—The court, after commenting upon several sections of the bankrupt act, holds that a bankrupt who finds himself unable to pay 80 per cent. on the debts proved against him is not required to obtain the assent of those creditors who became such before January 1, 1869; That the assent of those of a later date is alone necessary; That the assent of a creditor of an earlier date is a nullity and cannot be counted.—*In re Wheeler et al.*, U. S. Dis. Ct., D. Ind., N. B. R., Oct. 1, p. 277; *s. c.*, C. L. N., Oct. 6, p. 18; *s. c.*, C. L. J., Oct. 26, p. 368.

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— *Discharge—Construction of statute.*—The words “before the final disposition of the cause,” in the amendment to the bankrupt act, approved July 26, 1876, mean before the assignee has completed his administration and received his discharge from the register; and where the assignee was so discharged November, 1, 1876, and the bankrupt applied for his discharge September 17, 1877, *held*, the application came too late and must be rejected.—*In re Crose*, U. S. Dis. Ct., D. Ind., C. L. J., Oct. 5, p. 813; *s. c.*, N. B. R., Oct. 15, p. 294.

— *Discharge—Pleading of.*—To exempt a debt from the operation of a discharge on the ground of fraud, it must be tainted with fraud in its inception; If the contract was fair and honest when made, the benefit of a discharge will not be cut off by any subsequent fraudulent conduct on the part of the debtor in respect to it; Where the bankrupt bought the business of another, agreeing to pay his debts and hold him harmless, a discharge will release him, although he has made false representations that he has paid one of such debts; The better and more logical pleading is, not to attempt to avoid a discharge by averments in the declaration, but to reply such matter in response to the plea.—*Brown et al. v. Broach et al.*, Sup. Ct. Miss., N. B. R., Oct. 15, p. 296.

— *Discharge—Vacation of.*—A discharge obtained by fraud will be vacated; A decree annulling a discharge cannot be set aside except upon due notice to the parties to be effected thereby.—*In re Augenstein*, Sup. Ct., D. C., N. B. R., Oct. 1, p. 252.

— *Exemptions—Homestead.*—*Held*, that a bachelor, under the bankrupt law and statute of Missouri, may, under the circumstances of this case, be regarded as the head of a family, so as to be entitled to the exemption of his homestead.—*Bailey v. Cornings*, U. S. Cir. Ct., E. D. Mo., C. L. N., Nov. 3, p. 49.

— *Fraud—Omitting worthless item from schedules—Keeping proper books of account.*—If a bankrupt honestly regards a judgment held by him as worthless, he is not chargeable with false swearing, or fraud, if he omit it from his schedule; Even if it has value as an asset, and he considers it as having value, still its omission must be intentional in order to charge him with false swearing, or fraud; A merchant or trader who, prior to his becoming such, has kept books of account, showing the state of his affairs, is not required to carry their contents, or any part of them, into his books opened and kept as a trader, in order to satisfy the requirement of the statute as to a bankrupt keeping proper books of account while he is a merchant or tradesman; Keeping proper books of account, within the meaning of the bankrupt act, is the keeping of an intelligent record of the merchant's or tradesman's affairs, and with that reasonable degree of accuracy and care which is to be expected from an intelligent man in that business, and a casual mistake therein will not prevent a discharge; It is not required that a chattel mortgage, given to secure a debt, shall be entered upon the merchant's or trader's books; An entry of notes upon the fly-leaf of the blotter is sufficient.—*In re Zenos* G. Winsor, U. S. Dis. Ct., W. D. Mich., N. B. R., Sept. 1, p. 152.

— *Homestead—Purchased with partnership assets.*—Where a copartnership is insolvent, or is possessed of assets not more than adequate for the payment of debts, one member of the firm cannot, upon retiring, rightfully withdraw beyond the reach of creditors, and to their injury, a portion of the assets or property, and make a personal appropriation of those assets by putting them in the shape of a homestead; A homestead so purchased will be decreed to be given up if it appears to the satisfaction of the court that the funds with which it was purchased were wrongfully withdrawn from the partnership assets.—*In re Sauthoff & Olson*, U. S. Cir. Ct., W. D. Wis., N. B. R., Sept. 1, p. 181; *s. c.*, C. L. J., Oct. 26, p. 364.

— *Judgment for torts—Joint and several wrong-doers.*—K., on April 5th, mortgaged personal property to S. to secure endorsements; S., owing

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defendant, assigned the mortgage to him to secure the debt; On October 4th K. gave to G. a second mortgage for \$4,000 (which was used to pay note of K., endorsed by S. and G.) on the property, which also covered other property; October 12th K. sold the property for \$6,000, of which sum G. received \$3,500, and defendant \$2,500; S. paid nothing on the secured endorsements; November 2d bankruptcy proceedings were commenced against K., and plaintiff appointed assignee, who brought action against G. for the \$3,500 received by him, and another for the money paid on the notes; The first-named suit resulted in a judgment for \$4,000, which was satisfied, and the second was settled for \$2,000, and G. was released; *Held* (1), that, though the mortgage to S. was originally valid, he having paid nothing, the sum paid to defendant on it was a preference, and defendant liable to the assignee therefor; And (2) that the judgment against G., and its satisfaction, and the release, did not bar an action therefor against defendant.—*Sessions v. Johnson*, Assignee, Sup. Ct. U. S., Alb. L. J., Oct. 27, p. 299.

— *Jurisdiction of bankrupt court.*—State courts have jurisdiction of actions brought by an assignee in bankruptcy to set aside mortgages alleged to have been made in fraud of the bankrupt act; Personal service made upon one of the members of an insolvent firm, out of the jurisdiction of the district court in which the petition is filed, is not sufficient to give the court jurisdiction to adjudicate as against the party so served; The jurisdiction of the bankrupt court may be impeached in collateral actions.—*Isett v. Stuart*, Sup. Ct. Ill., N. B. R., Sept. 1, p. 191; *concluded* in N. B. R., Sept. 15, p. 193.

— *Liens—Creditor having, need not appear in bankrupt court.*—A creditor having a lien upon the bankrupt's estate may decline to appear in the bankrupt court, in which case he will be unaffected by the proceedings unless the proper steps are taken to sell the estate clear of all encumbrances; Or, he may elect to prove his debt in the bankruptcy proceedings and rely upon his security, and such action will be a waiver of his right to institute any suit or proceeding in any way inconsistent with such election; An objection that the purchaser at a sale made by the assignee in bankruptcy was the attorney for the assignee, and as such was incapable of purchasing, cannot be raised in a collateral action, but must be made in the bankrupt court.—*Spilman v. Johnson*, Ct. App. Va., N. B. R., Sept. 1, p. 145.

— *Lien—Delivery of execution to sheriff.*—In Colorado the delivery of an execution to the sheriff constitutes such a lien upon the debtor's property as will be valid against proceedings in bankruptcy filed after such delivery, but before a levy is made.—*Bartlett v. Russell*, U. S. Cir. Ct., D. Col., N. B. R., Sept. 15, p. 211.

— *Lien—Effect of bankruptcy proceedings upon liens obtained by executions levied subsequent to an attachment.*—Subsequent executions create a lien upon all the debtor's property in the sheriff's hands not covered by a prior attachment; Where an attachment is vacated by the commencement of proceedings in bankruptcy, the lien of subsequent executions is not thereby enlarged; the property passes to the assignee free from encumbrance to the extent of the attachment, and subject to the execution liens as to the excess.—*In re M. J. Nelson*, U. S. Dis. Ct., D. Vt., N. B. R., Oct. 15, p. 312.

— *Mortgage—Right of mortgagee to timber as against assignee.*—One who holds a mortgage valid as against the provisions of the bankrupt law, with condition broken before the commencement of the proceedings, has a right as against the assignee to all the bark, wood, and timber cut from the premises, whether on them or not; Where such mortgagee has given notice of his claim to the marshal when he seized the property, and to the assignee when he took possession of it, and they afterwards keep possession, they are to be considered as taking it for him, and the expense of securing it should be borne by him.—*In re Bruce*, U. S. Dis. Ct., D. Vt., N. B. R., Oct. 15, p. 318.

— *Preferences—Deposit made to meet checks in clearing-house not a trust fund.*—Where a bank agreed to act as the agent of another bank for clearing-house purposes, and, as such agent, agreed to pay all the checks of the

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latter which came through the clearing-house, and received for that purpose, from time to time, the funds of the latter bank, which it passed to the credit of the latter bank, without keeping such funds separate from its owner, *held*, that the relation of debtor and creditor—the ordinary one of the bank to its depositors—was created, and that the deposits could not be considered as trust funds, which, on failure of the former bank, would not pass to its assignee; Under such circumstances the funds, when deposited, became the property of the former bank, and having paid on the day of its failure to the latter bank the deposits made to meet checks, such bank having knowledge of the insolvent condition of the former, *held*, that such judgment was a preference, and could be recovered by the assignee.—*Phelan, Assignee, v. Iron Mountain Bank, U. S. Cir. Ct., E. D. Mo., N. B. R., Oct. 15, p. 308; s. c., C. L. J., Oct. 19, p. 351.*

— *Preference—Exchange of securities.*—In this case the bankrupt, a merchant, doing business with a bank, had, from time to time, overdrawn his account with the knowledge of the cashier, but without the knowledge of any other officer of the bank; To secure these overdrafts the cashier procured from him a bill of sale of a portion of his stock in trade, which was not recorded nor accompanied with possession, and the bankrupt continued his business as usual. This was more than two months prior to the commencement of the proceedings in bankruptcy; Subsequently, and within two months of the commencement of proceedings in bankruptcy, the overdrafts were disavowed by the managers of the bank, who, to secure the bank, procured a new bill of sale, caused it to be put on record, and took possession of the goods; *Held*, that, although this was clearly a fraudulent preference within the meaning of the bankrupt law, yet, under the rule of *Sawyer v. Turpin, 1 Otto, 114*, the transaction took effect by relation to the first bill of sale, and, this having been given more than four months prior to commencement of proceedings in bankruptcy, the second bill of sale became a valid security.—*In re Doran, U. S. Dis. Ct., E. D. Mo., C. L. J., Sept. 21, p. 260.*

— *Preference—Exchange of securities—Chattel mortgage.*—The substitution and record of a chattel mortgage, correctly describing the note secured, for a prior, unrecorded mortgage, which incorrectly stated such note, *held* not to be an illegal preference, but a simple exchange of securities, within the rule laid down in *Sawyer v. Turpin, 1 Otto, 114*.—*Player, Assignee, v. Lippincott et al., N. B. R., Sept. 15, p. 208; s. c., U. S. Dis. Ct., E. D. Mo., C. L. J., Sept. 21, p. 260; s. c., affirmed, U. S. Cir. Ct., E. D. Mo., C. L. J., Oct. 12, p. 323.*

— *Preference—Knowledge of person taking.*—Where the bankrupt, at the time of giving a mortgage, in pursuance of a previous agreement, to secure a preëxisting debt, requests the creditor to permit him to secure other creditors in such instrument, such request is notice of the existence of such creditors and of the bankrupt's inability to pay them; A creditor who has obtained a preference is chargeable with knowledge of facts the existence of which he could have ascertained by the slightest effort; It is not necessary that the creditor should know that the law prohibits him from taking the preference; It is enough if he knows such facts and circumstances as bring it within the prohibition of the law, and make it a fraud in legal contemplation; An oral promise, made at the time the debt is contracted, to give security if required, cannot be executed after the debtor has become insolvent.—*Lloyd v. Strobridge, U. S. Dis. Ct., D. Cal., N. B. R., Sept. 15, p. 198; s. c., C. L. N., Sept. 22, p. 1.*

— *Preference—Knowledge of taker.*—Where the mortgage sought to be set aside was executed within the time specified in the Bankrupt Act, with a view to give a preference, the fact of repeated promises to pay, which were not kept, together with knowledge, on the part of the creditor, of a large amount of debts due by the bankrupt at or prior to that time, which he was unable to pay, *held* to be reasonable cause for the creditor to believe that the insolvency, which in fact existed, did exist; Where the creditor taking such mortgage knew of other unsecured debts which his debtor could

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not pay, and that a large part of the property was common to all from which to get their pay, *held* that he knew that the mortgage was made in fraud of the provisions of the Bankrupt Law.—*In re Armstrong*, U. S. Dis. Ct., D. Vt., N. B. R., Oct. 1, p. 276.

— *Proof of debt*.—Provable debts, although created by fraud, are discharged by a composition in bankruptcy.—*Wells v. Lamprey*, Sup. Ct. N. H., N. B. R., Sept. 15, p. 205; *s. c.* (with note), C. L. J., Sept. 21, p. 259; *s. c.*, C. L. N., Oct. 27, p. 48.

— *Proof of debt—Actionable claim*.—No debt can be proved on which an action could not be maintained against the bankrupt in the state where the petition is filed, in case bankruptcy proceedings were not instituted.—*In re A. J. Doty*, U. S. Dis. Ct., D. Minn., N. B. R., Sept. 15, p. 202; *s. c.*, C. L. N., Sept. 22, p. 1.

— *Proof of Debt—Discharge*.—A judgment recovered pending the bankruptcy proceedings, in an action begun before, and based upon a provable debt, is itself provable; A creditor having such a judgment has an interest in the question of discharge, and a right to be heard thereon; Such judgment will be released by a discharge duly granted to the bankrupt judgment debtor.—*In re Stansfield*, U. S. Dis. Ct., D. Nev., N. B. R., Oct. 1, p. 268.

— *Proof of Debt—Separate bankruptcy*.—A joint creditor, in case of the bankruptcy of one member of the firm, has a right to prove his joint debt and vote for assignee in the separate bankruptcy.—*In re Webb*, U. S. Dis. Ct., D. Nev., N. B. R., Oct. 1, p. 258; *s. c.*, C. L. N., Oct. 18, p. 27.

— *Sale of encumbered property*.—Where an assignee sold property encumbered by a chattel mortgage, without an order of court, and the mortgagee brought trover against the purchaser in a state court in a county where the parties and their witnesses resided, *held* that, even if the district court had jurisdiction to restrain the prosecution of the suit, it ought not to do so under the circumstances of the case.—*In re Abram Cooper*, U. S. Dis. Ct., E. D. Mich., N. B. R., Sept. 1, p. 178.

— *Secured creditor—Mortgagee may foreclose in state court*.—The bankrupt law does not prohibit a mortgagee, whose lien is undisputed, from enforcing the collection of his mortgage in a state court, subject to the right of the United States court to intervene for the protection of the bankrupt's estate.—*Green, Assignee, v. Arbuthnot*, Sup. Ct. Pa., W. N. C., Oct. 18, p. 357.

BANKS AND BANKING.—*Winding up—What obligations are to be received by assignees in payment of debts due a bank—Act of April 16, 1850*.—A protested draft is not such an "obligation," within the meaning of the proviso of sec. 27 of the act of April 16, 1850, as the assignees of an insolvent bank are bound to receive in payment of a debt due the bank.—*Basehore's Appeal*, Sup. Ct. Pa., W. N. C., Oct. 11, p. 337.

— *Duties of director*.—Facts relating to the management of the bank, of which a bank director must take knowledge; Cashier allowing overdraft for an insufficient and illegal consideration; Bank cannot buy its own stock; Liability of a bank director.—*German Savings Bank v. Wulfekuhler*, Sup. Ct. Kan., C. L. J., Oct. 26, p. 366.

BILLS AND NOTES.—*Negotiability*.—Promissory note; Negotiability of, destroyed by collection-fee clause.—*Woods v. North et al.*, Sup. Ct. Pa., C. L. N., Sept. 15, p. 428.

— *Endorsement of promissory note by third party before delivery*.—When a promissory note, made payable to a particular person or order, is first endorsed by a third party, such third person is held to be an original promisor, guarantor, or endorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place; Endorsement in blank; Endorsement subsequent to the making of the

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note; Endorsement of note for discount; Parol proof admissible to show when the note was delivered; Third parties endorsing a negotiable promissory note before the payee, and before it is delivered to take effect, cannot be held as first endorsers.—*Good v. Martin*, Sup. Ct. U. S., Alb. L. J., Nov. 8, p. 316; *s. c.*, C. L. N., Nov. 10, p. 57.

BONDS, MUNICIPAL.—*Subscription to stock of R. R.*—Location of road; Submission of the question to electors; Description of the road; Notice; *Bona fide* holder unaffected by notice to trustee.—Commissioners, etc., v. Thayer, Sup. Ct. U. S., C. L. J., Sept. 14, p. 245.

CARRIERS.—*Loss of baggage carried free.*—Damages for the loss of baggage cannot be recovered in *assumpsit* against the carrier if the baggage was carried free. An action of tort, however, will lie for negligent loss; A railway company carrying baggage free is held to no greater diligence than any other gratuitous bailee; Public policy requires that common carriers should exercise the same extreme care in carrying persons free as in carrying them for hire.—*Flint, etc., Railway Co. v. Weir*, Sup. Ct. Mich., C. L. J., Sept. 28, p. 285.

—*Delivery by common carrier to connecting line.*—The G. Railroad Company, under a contract, occupied for the unloading of goods brought by it to D. a section of a depot owned by the M. Railroad Company, a connecting carrier; The goods were handled by the employés of the M. Company, clerks of the G. Company merely keeping tally; When goods were designed for delivery to the M. Company they were placed in a specified part of the section, a transcript of their description was taken by the M. Company's clerk from the way-bills of the G. Company, and they were thereafter cared for by the M. Company; *Held* to constitute delivery to the M. Company, and the G. Company were not thereafter liable for their loss.—*Pratt v. Grand Trunk Ry. Co.*, Sup. Ct. U. S., Alb. L. J., Nov. 10, p. 331.

CONSTITUTIONAL LAW.—*Construction of statute.*—Under the statutes of this commonwealth, any person aggrieved by an order of the state board of health prohibiting the carrying on of his business, is entitled to the verdict of a jury upon the question whether the exercise of his business is dangerous to the public health; Construction of statute; Constitutionality.—*Sawyer v. State Board of Health*, Sup. Jud. Ct. Mass., C. L. J., Sept. 14, p. 242.

—*The power of a state to tax a street railway company*, organized under a charter which provided that "the said company shall also pay such license for each car run by said company as is now paid by other passenger railway companies in the city of Philadelphia;" At the time of the incorporation of this company the rate for license tax was fixed by the ordinances of the city at \$30 for each car run during the year; In 1867 this rate was increased, by ordinance, to \$50 for each car; The act of April 11, 1868, enacted that the various passenger railway companies in the city should pay annually to the city the sum of \$50, *as required by their charters*, for each car run during the year; The company paid at the rate of \$50 up to the year 1875, and then refused to pay more than \$30; In an action by the city to recover the tax, *held*, that act of 1868 was not unconstitutional, and that company had accepted the same by their action, upon the legal conclusion of obtaining certain benefits therein conferred.—*Union Passenger Ry. Co. v. Philadelphia*, Sup. Ct. Pa., W. N. C., Sept. 20, p. 303.

—*Railways in streets.*—The constitutional provisions which went into effect January 1, 1875, forbidding the legislature to pass a private or local bill granting to a corporation, etc., the right to lay a railroad track, or granting any exclusive privilege, etc., or to authorize the construction, etc., of a street railroad without the consent of property owners, *held* not to be violated by sec. 36 of laws 1875, ch. 603, authorizing the construction of an elevated street railway in New York city; Where, at the time the constitutional pro-

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visions went into effect, a corporation had the right, under its charter, to lay a railroad track in the streets of a city, such right was not affected by the provisions mentioned, nor were legislative enactments passed in 1875, and accepted by the corporation, changing the method of constructing such track, obnoxious to such provisions.—*Matter of Gilbert Elevated R. R. Co.*, Ct. App. N. Y., Alb. L. J., Sept. 22, p. 204.

— *Construction of a statute prescribing the form of patent-right notes.*—The statute of Ohio, passed May 4, 1869 (66 O. L., p. 98), which provides that "any note the consideration for which shall consist in whole or in part of the right to make, use, or vend any patent invention, or inventions claimed to be patented, the words 'given for a patent right' shall be prominently and legibly written or printed on the face of such note or instrument, above the signature thereto, and such note or instrument in the hands of any purchaser or holder shall be subject to the same defences as in the hands of the original owner or holder;" *Held*, that such a law impaired the value of patent-right property, a species of property created by the constitution and the laws of congress, and was, therefore, unconstitutional.—*Woollen v. Banker*, U. S. Cir. Ct., S. D. Ohio, Am. L. Rec., Oct., p. 236.

— *Government de facto.*—The state government of Virginia which existed at Richmond during the war, and the Confederate government of which it formed a part, were at least governments *de facto*, and contracts arising thereunder are valid, and will be enforced, unless prohibited by the constitution of the state.—*Acc. Dinwiddie Co. v. Stuart, B. & Co.*, 1 Va. L. J., p. 297.

— *Judgment of a court of general jurisdiction cannot be collaterally impeached.*—Where a court of general jurisdiction has conferred upon it special powers, by a special statute, which are only exercised ministerially, and not judicially, no presumption of jurisdiction will attend its judgments, and the facts essential to the exercise of the special jurisdiction must appear on the face of the record.—*Pulaski County v. Stuart et al.*, Sup. Ct. App. Va., C. L. N., Oct. 6, p. 18.

— *Patents—Conditions of transfer—State legislation—Notes given for patent rights—Constitutionality of statute.*—As congress alone can determine to whom and on what conditions patent rights shall be granted, and how they shall be transferred or disposed of, it is not competent for state laws to impose conditions of transfer which interfere with those rights or diminish their value; A state statute requiring notes given for patent rights to be inscribed to that effect, and subjecting them when so inscribed (or when not so inscribed, if held by one knowing the consideration) to the same defences in the hands of every holder as exist against the original holder, and making it a misdemeanor to take, purchase, sell, or transfer any such note not so inscribed, knowing the consideration, is, therefore, unconstitutional and void.—*Cranson v. Smith*, Sup. Ct. Mich., C. L. J., Nov. 2, p. 386.

— *Power of city to contract indebtedness.*—Limitation upon the power of cities to contract indebtedness; When a city contracts a debt beyond the constitutional limit, it may be perpetually enjoined.—*Mayor, etc., of Springfield v. Edwards*, Sup. Ct. Ill., C. L. N., Nov. 8, p. 51.

CONTEMPT.—*Process of state court disregarded by receivers of federal court.*—On March 6, 1873, an injunction was granted by the state court against the Cairo & Vincennes Railroad Company, restraining its agents, employes, and attorneys from the use of an avenue in the city of Cairo, for loading and unloading cars; from leaving them standing thereon, or making up trains, and from using railroad tracks for switching cars or trains thereon, or for any purpose other than for transit of cars and trains over their tracks, etc.; This writ was served on an agent of the corporation on the next day; On March 5, 1874, plaintiffs in error were appointed, by the United States District Court for the Southern District of Illinois, receivers of the road, and entered

CONTEMPT—Continued.

upon the discharge of their duties; They disregarded the injunction, and switched daily upon the forbidden track large numbers of cars to be loaded and unloaded, etc.; *Held*, that the receivers acted in contempt of the state court, and are amenable thereto; The order and writ are matters of public record, of which all persons are bound to take notice at their peril, and the receivers are legally the agents of the corporation, although they are under the direction of the court appointing them; The federal court could not legally dissolve the injunction granted by the state court.—*Safford et al. v. The People*, Sup. Ct. Ill., C. L. J., Nov. 2, p. 384.

CONTRACTS.—Usage of trade as affecting contracts—Contracts for future delivery of grain, when illegal.—On a contract for the sale and delivery of grain at a future day, where the delivery and payment are to be concurrent acts, neither party can put the other in default without performing on his part, or offering to perform; A contract for the sale of wheat in store, to be delivered at a future time, which requires the parties to put up margins as security, and provides that, if either party fails, on notice, to put up further margins according to the market price, the other may treat the contract as filled immediately, and recover the difference between the contract and market price, without offering to perform on his part, or showing an ability to perform, is illegal and void, as having a pernicious tendency.—*Lyon v. Culbertson*, Sup. Ct. Ill., C. L. J., Nov. 9, p. 401; *s. c.*, Alb. L. J., Nov. 10, p. 380.

CONVEYANCES.—Delivery of deed; When title passes; Tax sale; Redemption.—*Gould v. Day*, Sup. Ct. U. S., C. L. N., Oct. 6, p. 17.

CORPORATIONS.—Equity—Fraudulent transfer of corporation shares—Bona fide purchaser.—The owner of shares in a corporation the certificates to which have been taken from her possession without her knowledge, and, by means of a forged power of attorney in her name to the corporation, have been transferred through intermediate parties to a *bona fide* purchaser for value, to whom the corporation has issued new certificates, can maintain a bill in equity to compel the corporation to issue a certificate to her for her shares, and to pay her the dividends thereon; A *bona fide* purchaser for value of corporation shares transferred in fraud of the owner cannot be joined as a defendant in a suit in equity by the owner of the stock, against the corporation, to compel it to issue a certificate to her for such shares and to pay her the dividends thereon.—*Pratt v. Taunton Copper Co.*, Sup. Jud. Ct. Mass., C. L. J., Sept. 21, p. 261.

—*Equity practice.*—Suing; Striking out president's name; Evidence; Admissions cannot prevent party from producing documentary evidence of the facts; Agents' declarations; Sale of personal property; Warranty; Person injured by breach not obliged to elect between a return of the goods and damages, but may be entitled to keep the goods and recover damages in addition; Manufacturer selling second-hand articles with warranty to be as good as new.—*Kimball, etc., v. Vroman*, Sup. Ct. Mich., Am. L. Reg., Oct., p. 600.

—*Stock in Corporations.*—*Certificates not negotiable in a commercial sense.*—Certificates of stock in a corporation are not negotiable in a commercial sense, and the title to them cannot be transferred by one who fraudulently obtained possession of them from the owner; The plaintiff took a blank, instead of a special, endorsement of the certificates from Maurice, and neglected to have the stock transferred on the books of the company; Maurice afterward stole the certificates and transferred them to third parties; *Held*, that the plaintiff was not guilty of such negligence as will require him to bear the loss of the stock.—*Winter v. Belmont Mining Co.*, Sup. Ct. Cal., C. L. N., Oct. 27, p. 43.

COUNTIES.—*An ordinary county warrant is not, per se, a proper subject of action; A paper in form a warrant, and to be held as a voucher, may contain other matter which converts it into a contract and evidence of debt;*

COUNTIES—*Continued.*

Money lent bears interest without express agreement.—*Borough of Port Royal v. Graham*, Sup. Ct. Pa., W. N. C., Oct. 18, p. 352.

COURTS.—*Jurisdiction of United States circuit court—Stockholder's bill.*—The United States circuit court will not entertain a bill in equity by a non-resident stockholder of a resident corporation, where it appears that the issues raised by the bill have been already adjudicated in a suit brought in the state court between the corporation and the proper adversary parties, and litigated there without fraud or collusion.—*Chaffin v. City of St. Louis*, U. S. Cir. Ct., E. D. Mo., C. L. J., Sept. 28, p. 284.

—*The right of removal from state to federal court.*—The right to a removal of a case from a state to a federal court depends upon the condition of the alleged controversy as it appears at the time of the filing of the complaint, and where the right of removal is to be determined by the fact of one of the defendants being a necessary or unnecessary party, the complaint is what is to be looked to to determine the question, and it is immaterial whether such defendant, in its answer, accepts or declines the issues tendered.—*Latham v. Barney*, U. S. Cir. Ct., D. Minn., C. L. N., Sept. 29, p. 11.

—*Removal of cause—Power of state court in vacation.*—A cause was referred to a referee, under the statute of Iowa, for trial in vacation; A petition, affidavit, and bond were filed in the office of the clerk of the state court, under the Rev. Stat., sec. 639, subd. 3, for the removal of the cause to the federal court; *Held*, not to have the effect to divest the jurisdiction of the state court, or of the referee, to proceed to a trial pursuant to the order of reference; Under sec. 639 of the Rev. Stat., a removal of a cause from the state court cannot be effected in vacation, without any action of the state court.—*Scott v. Otis*, U. S. Cir. Ct., D. Ia., C. L. N., Oct. 27, p. 41.

CRIMINAL LAW.—*Obstructing the passage of the mail.*—The act of congress which makes it criminal to obstruct or retard the passage of the mail applies where the mail is carried by rail in a passenger train which is unlawfully stopped by persons who are willing to permit the passage of the mail car detached from the passenger cars of the train; Words used by such persons may be acts of obstruction when they constitute part of the wrongful business in question.—*United States v. Clark*, U. S. Dis. Ct., E. D. Pa., C. L. N., Sept. 15, p. 427.

—*Former conviction.*—Where the defendant was tried and convicted for a conspiracy to defraud the government out of the taxes due on whiskey distilled by the several parties named in the indictment, and it was alleged that in pursuance of that conspiracy other parties than defendant, who were his co-conspirators, did unlawfully remove said whiskey, *held*, that such conviction would be a bar to another indictment against the defendant, charging him with aiding and abetting this same removal; That the plea of pardon is a bar to the present suit.—*United States v. McKee*, U. S. Cir. Ct., E. D. Mo., C. L. N., Oct. 6, p. 18.

—*Jurisdiction of federal court.*—After a state has been admitted into the Union, the fact that, within its boundaries, land, the fee of which is in the United States, is set apart as an Indian reservation, is not enough, of itself, to give a United States court jurisdiction to try a person for a murder committed within the limits of such reservation.—*Ex parte Sloan et al.*, U. S. Dis. Ct., D. Nev., C. L. N., Oct. 18, p. 26.

—*Indictment under section 3892, Rev. Stat., for taking letter from the post-office.*—On an indictment under sec. 3892 of the Rev. Stat., for taking a letter from the post-office with intent to obstruct correspondence, the defendant may be convicted without evidence of an unlawful, clandestine, or fraudulent taking; In such case "correspondence" may be "obstructed," within the statute, by an intentional non-delivery of the letter so taken from a post-office; A party indicted for such taking of a letter, with intent "to pry into the business or secrets of another," cannot be convicted if he *knew* the con-

CRIMINAL LAW—Continued.

tents of the letter before he received it; It is no defence for a party indicted for such taking of a letter that it related in part to his business, or business in which he was interested; In such case it is no defence that the accused, in *good faith*, believed that the letter was of no value to the person to whom it was addressed, even if such be the fact; The writer of a letter which has passed from the office where mailed has no right to intercept it, or authorize its delivery to a person other than the one to whom it is directed; It is no defence that the letter was voluntarily delivered to the defendant by the postmaster.—United States v. Nutt, U. S. Dis. Ct., N. D. Ohio, Am. L. Rec., Nov., p. 802.

DAMAGES.—*Measure of, for overflowing lands.*—That the court below should not have permitted the appellee to have proved that, if the land overflowed had been planted with potatoes, the ground would have yielded 200 bushels to the acre; That in cases of this character the true measure of damages is the fair rental value of the ground, and not the possible, or even probable profits that might have been made if the land had not been overflowed; The case of the Chicago & Rock Island R. R. Co. v. Ward, 16 Ill. 522, not followed.—City of Chicago v. Hunerbrin, Sup. Ct. Ill., C. L. N., Oct. 27, p. 48.

—*Suit for damages for killing hog.*—When one is sued for killing his neighbor's hog, he cannot plead the bad character of the hog as a defence; The plea was stricken out in the court below, and this ruling was sustained.—Ussery v. Pearce, Ct. App. Tex., Am. L. Rec., Nov., p. 809.

DEBTOR AND CREDITOR.—*Equity of redemption—Sale.*—An execution creditor has a right to buy, and the debtor to sell, the latter's equity of redemption in land that has been sold under the execution; A judgment creditor whose judgment has been satisfied of record by the sale of property cannot, without first setting aside such satisfaction, redeem from another creditor property of the common debtor.—Carter *et al.* v. German National Bank, Sup. Ct. Tenn., C. L. J., Sept. 14, p. 241.

—*Distribution of proceeds of sheriff's sale.*—Judgment held as security by the guarantor of another judgment; Whether such guarantor can share in the distribution with other judgment creditors whose judgments were entered on same day.—Wall's Appeal, Sup. Ct. Pa., W. N. C., Oct. 11, p. 344.

ELECTIONS.—*Ballots as cast to control—Preservation of ballots as evidence—Custody.*—Ballots cast at an election are the primary, the controlling evidence; As between the ballots cast at an election and a canvass of those ballots by the election officers, the former are the primary, the controlling evidence; In order to continue the ballots controlling evidence it must appear that they have been preserved in the manner and by the officers prescribed in the statute, and that while in such custody they have not been so exposed to the reach of unauthorized persons as to afford a reasonable probability of their having been changed or tampered with.—Hudson v. Solomon, Sup. Ct. Kan., C. L. J., Nov. 9, p. 404.

—*Duty of canvassers of votes—Mandamus—Ministerial and judicial officers.*—It is the duty of the canvassers of votes of an election to certify the votes as returned to the county clerk, and any alteration of such votes, made upon the poll books after they came into his custody, cannot alter their duty to certify the votes so returned; In such a case they are required to restore the true figures, and certify the same as originally returned; And where the canvassers have knowledge that an alteration has been made, but do not know positively that such alteration was made after the poll books came into the custody of the county clerk, and have not the power to take testimony as to the fact, the circuit court has power, in a proceeding by *mandamus* to compel such officers to count the votes certified to them, to determine for them which was the vote so certified; A writ of *mandamus* will lie to compel the performance of a particular ministerial act, although it will not lie

ELECTIONS—Continued.

to compel the performance of a particular judicial act; It simply requires the judicial officer to proceed to do his duty, while, in addition to this, it indicates to the ministerial officer what his specific duty is.—*State, ex rel. Metcalfe, v. Garesché*, Sup. Ct. Mo., C. L. J., Nov. 9, p. 407.

ESTOPPEL.—Admission made to constable making a levy—Fraud.—A statement made to a constable about to levy an execution, by one who has a landlord's lien on the property upon which it is intended to levy, that he had "no claim on the property, as he had Fisher on the notes to secure him," is binding, and the landlord is estopped from claiming the property after a sale, under the execution, to a *bona fide* purchaser for value, even though the latter did not know, before the sale, of the admission made to the officer: To constitute an estoppel there need not be something tantamount to fraud. The element of fraud is essential, either in the intention of the party estopped or in the effect of the evidence which he intends to set up.—*Kinnear v. Mackey*, Sup. Ct. Ill., C. L. J., Sept. 21, p. 262.

EQUITY.—Facts sufficient to put a party upon enquiry.—Prior equity to enforce lien against certain real estate declared to be in plaintiff who had taken certain notes secured by deed of trust on the real estate in pledge for a loan, so decreed as against certain defendants who claimed a lien by virtue of a second deed of trust, made in the belief that the first deed of trust had been released by a recorded deed, but which deed of release was really void. *Held*, that there were facts which should have put defendants upon enquiry, and that they were required to exercise legal diligence to see that the title was valid and the property released from the lien of the first deed of trust when they took their conveyance.—*Smith v. Perkins et al.*, U. S. Cir. Ct., N. D. Ill., C. L. N., Nov. 3, p. 49.

EQUITY PLEADING.—Necessary parties.—A person who, as agent or bailee, obtained possession of property belonging to the trust estate, and who, after the death of the trustee, acted as trustee without authority, cannot be compelled to account by a bill in equity, filed against him by certain of the *cestuis que trustent*, in which several of the persons interested in the trust estate were not made parties, nor represented by a trustee of the whole estate.—*Dolbert's Appeal No. 3*, Sup. Ct. Pa., W. N. C., Sept. 13, p. 294.

EVIDENCE.—Admissibility of testimony of party defendant against plaintiff intestate.—On a third trial of a cause involving the same subject-matter, but after the form of action had been changed and an administratrix substituted for the deceased plaintiff, after the testimony on the part of the plaintiff, including the notes of the testimony given by the deceased plaintiff on a former trial, was closed, the defendant was offered as a witness in his own behalf as to matters which occurred during the life of the plaintiff: *Held* (reversing the judgment of the court below), that the evidence of defendant should not have been admitted.—*Evans' Admx. v. Reed*, Sup. Ct. Pa., W. N. C., Sept. 20, p. 301.

— **Presumption of payment from lapse of time.**—It is a question for the court whether a given state of undisputed facts will rebut such a presumption as that of payment from lapse of time.—*Beale's Exrs. v. Kirk*, Admr., Sup. Ct. Pa., W. N. C., Oct. 11, p. 340.

— **Action for mesne profits.**—Conclusiveness of judgment in ejectment: Presumption of possession arising from judgment in ejectment; Admissibility of evidence that defendant was not in possession after the service of the writ of ejectment.—*Miller v. Henry*, Sup. Ct. Pa., W. N. C., Nov. 1, p. 376.

EXECUTION.—Waiver of exemption in judgment note.—Ignorance of maker of note of the fact that it contained the waiver; Effect of such ignorance of validity of waiver; Negligence.—*Adams et al. v. Bachert*, Sup. Ct. Pa., W. N. C., Nov. 1, p. 378.

EXECUTORS AND ADMINISTRATORS.—*Orphans' court.*—Jurisdiction of, as to fund deposited jointly by an administrator and foreign guardian.—Appeal of the Harrisburg National Bank, Sup. Ct. Pa., W. N. C., Sept. 20, p. 805.

GIFT.—*Transfer of stock* by A to B on the books of the corporation; A, however, never informed B of the transfer, nor delivered to her the certificates of stock, but retained the same in his possession, and they were found, after his death, in an envelope endorsed with his own name and the name of B; It appeared that B was a niece of A, and had for many years been treated and regarded by him as his daughter; *Held*, affirming the decree of the court below, that the transfer on the books of the corporation vested in B a legal title to the stock, that the circumstances of the case rebutted any presumption of a resulting trust, and that B was, therefore, entitled to the stock.—*Reed v. Roberts et al.*, Sup. Ct. Pa., W. N. C., Oct. 18, p. 855.

HABEAS CORPUS.—*Judge may investigate charge.*—Under sec. 672, Gen. Stat., 1868, p. 763, the judge or court issuing a writ of *habeas corpus* on a petition complaining that the person in whose behalf the writ is applied for is restrained of his liberty without probable cause, may, in case there is no defect in the charge or process, summon the prosecuting witness, investigate the criminal charge, and discharge, let to bail, or recommit the prisoner, as may be just and legal; Evidence; False pretences.—*Ex parte Snyder*, Sup. Ct. Kas., C. L. J., Oct. 5, p. 807.

HIGHWAYS.—*Road law.*—Omission of supervisor to give bond; Act of March 16, 1860; Latent ambiguity in report of viewers; Admission of parol evidence to explain.—*Stephen v. Potter*, Sup. Ct. Pa., W. N. C., Nov. 1, p. 875.

—*Road law.*—Where there has been a view and review of a road or street, each reporting favorably as to the opening, but assessing different damages, the discretion of the court is confined to an approval of the damages last assessed.—*In re Road in Borough of Lewiston*, Sup. Ct. Pa., W. N. C., Nov. 1, p. 878.

HUSBAND AND WIFE.—*Lease of real estate of married women.*—Separate acknowledgment by wife; Acts of February 24, 1870, and April 11, 1848.—*Harbert v. Miller*, Sup. Ct. Pa., W. N. C., Oct. 4, p. 325.

—*Wife's separate estate—Income received by husband—Husband trustee—Change of property.*—If the husband and wife, living together, have for a long time so dealt with the separate income of the wife as to show they must have agreed that the husband, who was himself the trustee, should use it for family purposes, equity will not require him to account therefor until her consent is revoked; Where the husband is trustee for the wife, either expressly or by implication of law, a change in the form of the trust property made by him will not, without clear evidence of intention on the part of the wife to that effect, destroy the trust.—*Lishey v. Lishey*, Ch. Ct. Nashville, C. L. J., Oct. 5, 309.

—*Title to real estate in the wife.*—Fraud upon the husband's creditors; *Bona fide* mortgagees, for value, of the wife entitled as against the prior lien creditors of the husband.—*Lyon's and Taylor's Appeal*, Sup. Ct. Pa., W. N. C., Oct. 18, p. 849.

INSANE PERSONS.—*Deed of person non compos mentis void.*—May be impeached before office found; Intimate acquaintance may give opinion, when; Probate courts under territorial government.—*Farley v. Parker*, Sup. Ct. Oreg., C. L. J., Sept. 28, p. 287.

INSURANCE.—*Mutual companies.*—Assessments on premium notes; Condition that policy shall be void; Waiver by company; Liability of insured for assessment.—*Columbia Ins. Co. v. Buckley & Co.* (No. 1), Sup. Ct. Pa., W. N. C., Sept. 27, p. 813.

—*Mutual companies.*—Assessment; Condition that policy shall be void;

INSURANCE—Continued.

Waiver by company; Liability of insured for assessment; Evidence.—*Columbia Ins. Co. v. Buckley & Co.* (No. 2), Sup. Ct. Pa., W. N. C., Sept. 27, p. 315.

—*Mutual companies.*—Assessments on premium notes; Notice thereof; Proof necessary in suit by the company; Resignation of members.—*Buckley & Co. v. Columbia Ins. Co.* (No. 8), Sup. Ct. Pa., W. N. C., Sept. 27, p. 315.

—*Special charter.*—Statute construed; Power of directors to transfer assets to another company; Extent of power to reinsure; *Ultra vires.*—*Price v. St. Louis Mut. Life Ins. Co.*, St. Louis Ct. App., C. L. J., Oct. 5, p. 299.

INSURANCE, FIRE.—*False representations.*—The policy stipulated that the application should be considered a part thereof and a warranty, and that any false representations as to the condition, situation, or occupancy should render it void; Also, that, if the interest of the insured was any other than that of sole and unconditioned ownership, it must be so expressed, or the policy should be void; Also, if the house should remain vacant for ten days without notice or consent, the policy should be void; *Held*, that, if the house was not occupied as represented, the contract was violated at its inception, and never became binding on the company; that a statement, in the policy, of the existing use of the premises was a warranty that they were so used *in presenti*; That the policy was avoided by any false statement, whether material or not; That the provision in the Kentucky statute of February 4, 1874, that all statements or descriptions in the application shall be deemed representations and not warranties, only applies to those cases where the parties are silent as to the effect of such statements, and does not hinder the parties from agreeing that they shall be warranties; That, where the property is held subject to a vendor's lien for a part of the purchase money, this is not a sole and unconditional ownership.—*Farmers', etc., Co. v. Curry*, Ct. App. Ky., C. L. N., Oct. 27, p. 48.

INSURANCE, LIFE.—*Evidence.*—Life insurance policy; Forfeiture of; What evidence of a waiver of such forfeiture sufficient to go to a jury.—*Mutual Protection Life Ins. Co. v. Laury*, Sup. Ct. Pa., W. N. C., Sept. 27, p. 318.

—*Warranties—Breach of—Verdict.*—The court states what are to be regarded as warranties in an application for life insurance, and what will be regarded as breaches of such warranties; That the verdict is sustained by the evidence.—*Illinois Masons' Soc. v. Winthrop*, Sup. Ct. Ill., C. L. N., Oct. 27, p. 42.

INTERNAL REVENUE.—*Lien for taxes upon distillery property.*—Allegations in a bill that an assessment made by the commissioner of internal revenue is irregular, and in violation of law, and void, do not constitute any ground for an injunction to restrain the collection of the assessment; Representations by a collector of internal revenue, to the effect that the government has no claim upon distillery property for unpaid taxes, do not affect the right of the government to assert an existing lien for taxes upon such property; The remedy by bill in equity conferred by sec. 8207, Rev. Stat., is cumulative; Sec. 3224, Rev. Stat., is not limited in its application to the party taxed; A purchaser of distillery property upon which there is an existing lien for taxes due to the government cannot acquire the same freed from such lien, though he purchase in good faith for value and without notice of the lien; In a case where proceedings were instituted for forfeiture of a distillery, followed by seizure and subsequent release of the property on bond, under sec. 3331, Rev. Stat., but which were afterward discontinued by the government without any judicial declaration of forfeiture, a lien for unpaid taxes is not lost or affected by such bonding and release of the property in the forfeiture proceeding, and a subsequent purchaser from a former owner takes the property encumbered by the lien.—*Alkan et al. v. Bean et al.*, U. S. Cir. Ct., E. D. Wis., C. L. N., Oct. 13, p. 25.

JUDGMENTS—Judgment by confession—Application to set aside—Agreement to extend time of payment.—Where, on a motion to set aside a judgment entered in strict accordance with a warrant of attorney, the only ground shown was that the judgment included usurious interest, and where, on the hearing, the plaintiff voluntarily remitted a sum equal to the usury, *held*, that the court below properly overruled the motion; An agreement to extend the time of payment of a portion of a note, endorsed on the note and signed by the maker and payee thus, "The within named payee has the privilege of extending the time of the payment of the \$2,500 of the within note for one year after it becomes due, by paying interest thereon at the rate of 10 per cent. per annum during such extension," is not to be construed as an absolute extension, taking effect immediately; It is only a privilege of extension, and if the interest is not paid the privilege is lost; But, even if it had been a valid contract to extend the time of payment, when the court offered to stay execution until the end of the year claimed, the necessity of vacating the judgment no longer existed, and the court did not err in refusing to vacate on appellant's declining to accept this offer.—*Culver v. Graham*, Sup. Ct. Ill., C. L. N., Oct. 13, p. 27.

JUDICIAL SALES.—Distribution.—Priority of taxes over all other liens; Act of February 28, 1866, P. L. 116; Arbitration; An appeal from an award of arbitrators destroys the lien of the award; A subsequent withdrawal of the appeal does not reinstate the lien as of its former date.—*Eaton & Cole's Appeal*, Sup. Ct. Pa., W. N. C., Oct. 11, p. 342.

LANDLORD AND TENANT.—Estoppel.—Estoppel of tenant to deny landlord's title applies to case of house on third person's land; Expiration of landlord's title; Name; Omission of middle name will not invalidate proceedings.—*Ryder v. Mansell* (with note), Sup. Jud. Ct. Me., Am. L. Reg., Oct., p. 590.

—*Repairs.*—The owner of premises demised to a tenant is not liable for an injury sustained by a stranger owing to the premises being out of repair, unless he has contracted to do the repairs, or has let the premises in a ruinous and improper condition; In all other cases the tenant is *prima facie* liable.—*Nelson v. Liverpool, etc., Co.*, High Ct. Just. Com. Pl. Div. (Eng.), C. L. J., Oct. 5, p. 312.

LIBEL.—Privileged publication—Publishing contents of a petition for divorce.—A petition for divorce was filed in the circuit court against plaintiff, charging her with adultery; Defendant, before the petition was brought before the court for judicial action, published in its newspaper the substance of the petition without defamatory comments; *Held*, that the publication was not privileged, but that the law presumed malice therefrom, and that an action for libel would lie; Malice a question for the jury.—*Barber v. St. Louis Dispatch Co.*, St. Louis Ct. App., C. L. J., Oct. 26, p. 361.

—*Newspaper article—Admissibility of other articles in evidence—Meaning of words "crim. con.," "flagrante delicto"*—*Excessive damages.*—In an action for libel, libelous publications from the same paper, relating to other parties, may be put in evidence for the purpose of showing that the paper was recklessly conducted; *Scripps v. Reilly*, 4 C. L. J., 128, followed; The explanation of the court, to the jury, of the words, "*crim. con.*" and "*flagrante delicto*," approved; In an action against a newspaper having a large circulation, for a libel charging the plaintiff with adultery, a verdict of \$3,875 *held* not excessive.—*Gibson v. The Cincinnati Enquirer*, U. S. C. Ct., S. D. Ohio, C. L. J., Nov. 2, p. 380.

LIEN—Passes by assignment of note—When—Dower.—Where a deed to land retains upon its face a lien for purchase money, an assignment of the vendee's notes will pass the lien, with all the rights of the assignor against the land, and the assignee will have the same power to sell the land in its enforcement, and in the same way, as the vendor might have done had he retained the notes; The dower in such land entitles the widow to only one-

LIEN—Continued.

third of the surplus after the note had been liquidated, her interest being subordinate to its payment.—*Featherston v. Boas*, Sup. Ct. Tenn., C. L. N. Nov. 10, p. 59.

— *Mechanic's*.—Power of superintendents of the construction of county court-house; Power of board of supervisors to bind county; *Held*, that the mechanic's lien law cannot be enforced against the property of a county.—*Bouton v. Board of Supervisors, etc.*, Sup. Ct. Ill., C. L. N., Oct. 20, p. 33.

— *School property—Sub-contractor—Suit by*.—*Held*, that the mechanic's lien law cannot be enforced against school-houses, and that a sub-contractor, upon giving the notice as required by statute, not having a lien on the school-house, he cannot sue the directors.—*Quinn v. Allen*, Sup. Ct. Ill., C. L. N., Oct. 20, p. 34.

MANDAMUS.—*School board*.—Power of to receive draft in payment for bonds: Negotiable paper; Laches in presentment of; What constitutes.—*Muncy, etc.*, District v. Commonwealth, Sup. Ct. Pa., W. N. C., Oct. 25, p. 365.

MASTER AND SERVANT.—*Employment of servant by joint masters*.—T. was employed as a signalman by the G. Railway Company at a station which abutted upon a station of the N. Railway Company; The business of T. was common to both stations, and was to signal the trains of both companies, and he was called one of the joint-station staff, all of whom were appointed and paid by the G. Company, but the expense of their salaries was borne equally by the two companies; *Held*, that he was employed as the servant of both companies, and the N. Company was not liable for his death through the negligence of one of its servants.—*Swainson v. Northeastern Railway Co.* High Ct. Just., Exch. Div. (Eng.), Alb. L. J., Oct. 13, p. 261.

MORTGAGES.—*A chattel mortgage fraudulent and void in part, void in its whole extent*.—Where a mortgage is given on a stock of goods and fixtures, and the mortgagor, with the knowledge and consent of the mortgagee, remains in possession of the mortgaged property and carries on his business just as he had done before the execution of the mortgage, using the proceeds of the sales as his own, such mortgage is absolutely void as to creditors, although the agreement extended only to the stock on hand and not to the fixtures. The unlawful design, though confined to a part only of the property, affects the whole transaction and renders the entire mortgage void.—*In re Burrows*, U. S. Dis. Ct., D. Ind., C. L. J., Sept. 14, p. 241.

— *Unplanted crop*.—A mortgage by the owner of land upon a crop yet to be planted is valid against an execution creditor.—*Wyatt v. Watkins*, Sup. Ct. Tenn., Sept. 22, p. 205.

— *Deed absolute recorded, and unrecorded defeasance*.—Lien thereof as to subsequent creditors.—*Corpman v. Baccaston et al.*, Sup. Ct. Pa., W. N. C., Oct. 4, p. 331.

— *Married woman's mortgage*.—Judgment to secure purchase-money: Holder cannot claim on fund in hands of administrator; Proceedings before auditors; When admission of incompetent evidence not ground for reversal.—*Lawtelle's Appeal*, Sup. Ct. Pa., W. N. C., Oct. 25, p. 361.

MUNICIPAL CORPORATIONS.—*Statutes, construction of*.—Constitutional law: Repeal of statute as affecting license.—*Davis v. The State*, Ct. App. Tex., C. L. J., Sept. 28, p. 288.

— *Obstructions in streets*.—Municipal corporation, charged by legislation with the duty of keeping streets in good condition, is liable to person injured by obstructions kept there an unnecessary time, even though put there originally for a lawful purpose, as, *e. g.*, the building of a sewer; Committing the work to a contractor will not excuse in such case; A storekeeper on the street, whose business has been impeded by the building of the sewer, is a person injured.—*Williams v. Tripp*, Sup. Ct. R. L., Am. L. Reg., Oct., p. 613.

MUNICIPAL CORPORATIONS—Continued.

— *Implied power to issue and sell negotiable bonds.*—Extent of such power; Implied power to improve streets.—Select and Common Councils, etc., v. Commonwealth, Sup. Ct. Pa., W. N. C., Nov. 8, p. 385.

— *Fee in street—Grant of right of way—Damages resulting from such grant.*—The city holds the fee in its streets, but it is in trust for the use of the public for the purposes of a street; A city or village may authorize the laying of railroad tracks in their streets, but the city has no right to so obstruct the streets as to deprive the public and adjacent property-holders from their use as streets; Where the city authorizes the structure which causes injuries, it will be liable for damages, on the principle of *qui facit per alium facit per se*.—Stack v. East St. Louis, Sup. Ct. Ill., C. L. J., Nov. 2, p. 385; s. c., C. L. N., Nov. 10, p. 58.

NATIONAL BANKS.—*Enjoining taxation of national bank shares.*—When bank a proper party; Injunction to stay tax; Grounds of; Multiplicity of suits; Rate of taxation; Deduction of shareholders' indebtedness; Deducting real estate owned by bank; Double taxation.—City National Bank, etc., v. City of Paducah et al., U. S. Cir. Ct., D. Ky., C. L. J., Oct. 19, p. 347.

— *Dealing in promissory notes.*—Under the congressional act authorizing the creation of national banks, those associations possess no power to deal and speculate in promissory notes as choses in action, for purposes of private gain and profit alone, or to acquire any title thereto by purchase, other than in the way of discount.—First National Bank, etc., v. Pierson, Sup. Ct. Minn., C. L. N., Oct. 13, p. 27; s. c., Alb. L. J., Nov. 8, p. 319.

NEGLIGENCE.—*Injury sustained while on defendant's premises.*—The plaintiff, a licensed waterman, having complained to a person in charge that a barge of the defendant's was being navigated unlawfully, was referred to defendant's foreman; While going along defendant's premises, in order to see the foreman, the plaintiff was injured by the falling of a bale of goods so placed as to be dangerous and yet to give no warning of danger; Held (1), that the plaintiff was not a bare licensee, but was on defendant's premises by the invitation of defendant, and for a purpose in which both plaintiff and defendant had a common interest; and (2) that the injury was caused by a trap, or concealed source of mischief, within the meaning of Bolch v. Smith, 10 W. R. 387, 7 H. & N. 786.—White v. France, High Ct. Just., Com. Pl. Div. (Eng.), C. L. J., Sept. 28, p. 281.

— *Action for damages for negligence—Question of title, when immaterial.*—The plaintiff sued the defendants for the value of a saw-mill and a quantity of lumber burned by a fire alleged to have been set by the negligence of the defendants; Both the plaintiff and defendants claimed title to the ground on which the mill and lumber stood, both claiming under a common source of title, and it was admitted that the plaintiff's claim was made in good faith; Held, that the question of title was immaterial; Even if the plaintiff should be evicted, he would, under the local statute (Code of Iowa, §§ 1976-1981), be entitled to value of the improvements made in good faith.

— *Testimony of experts.*—In a case where fire is shown to have been communicated from one building to another, in determining whether the former fire was the proximate cause of the latter, the testimony of insurance men, as experts, to the effect that, owing to the distance between the two buildings, the former would not, in fixing the rate of insurance, be considered an exposure of the latter, will not be heard.

— *Proximate and remote cause—Question for jury.*—What is the proximate cause of an injury is, in general, not a question of science or legal knowledge, but a question of fact for a jury; [Denying Webb v. Rome, etc., R. R. Co., 49 N. Y. 420, and Penn. R. R. Co. v. Hope, 80 Pa. St. 373].—Kellogg v. St. Paul, etc., Railway Co., Sup. Ct. U. S., C. L. J., Oct. 5, p. 305.

— *Liability of board of education.*—A board of education is not liable in its corporate capacity for damages for an injury resulting to a pupil, while

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attending a common school, from its negligence in the discharge of its official duty in the erection and maintenance of a common-school building under its charge, in the absence of a statute creating a liability.—*Finch v. Board of Education, etc.*, Sup. Ct. Comm. Ohio, C. L. J., Oct. 12, p. 320.

— *Contributory negligence.*—Contributory negligence; Case in judgment: Instructions; Error; General and specific instructions.—*Krouse v. Pittsburg, etc.*, R. R., Sup. Ct. Comm. Ohio, C. L. J., Oct. 19, p. 348.

— *Contributory negligence.*—Passenger in horse-car leaving his seat while car in motion, for purpose of being ready to get out when the car stops: Question for jury.—*Bardon v. Boston, etc.*, R. R. Co. (with note), Sup. Jud. Ct. Mass., Am. L. Reg., Nov., p. 664.

PATENTS.—*Patentability.*—Patent case; What is patentable; The patents of Stow, Degolyer, and others, for improvements, etc., in pavements, considered.—*Stow v. Chicago*, U. S. Cir. Ct., N. D. Ill., C. L. N., Sept. 15, p. 423.

— *Infringement.*—When patent assigned.—*Hamilton v. Rollins*; *Same v. Todd*; *Same v. Sherwood*; *Same v. Butler*, U. S. Cir. Ct., D. Minn., C. L. N., Sept. 22, p. 4.

— *Patent law—Preliminary injunction—Proof of infringement.*—On an application for preliminary injunction, pending hearing of suit in equity, to restrain alleged infringements of complainant's patent, reissues Nos. 5841, 6030, 6594, and 6595, relative to improvements in milling process and machines, *held*, that, for purposes of the motion, the patent of complainant must be treated as valid under decision of the United States Supreme Court. in *Cochrane v. Deener*, but that complainant having failed to establish infringement by defendant, motion must be denied.—*American Middlings Purifier Co. v. Atlantic Milling Co.*, U. S. Cir. Ct., E. D. Mo., C. L. J., Oct. 12, p. 323.

— *Motion for preliminary injunction.*—A motion for a provisional injunction is always an appeal to the discretion of the court, but in the class to which this case belongs such discretion ought to be exercised only where the complainant's title and the defendant's infringement are admitted, or are so clear and palpable that the court can entertain no doubt on the subject. After a careful review of the facts brought to the knowledge of the court, the right of injunction is not free from doubt, and the motion for a preliminary injunction is therefore denied.—*The Bailey, etc.*, *Co. v. Adams*, U. S. Cir. Ct., W. D. Pa., C. L. N., Oct. 27, p. 41.

PRINCIPAL AND AGENT.—*Real-estate broker.*—Liability of principal; Executory contract to sell real estate; Deficiency in quantity; Trial without jury; Presumptions as to finding of court below.—*Coleman's Exrs. v. Meade*, Ct. App. Ky., C. L. J., Nov. 9, p. 409.

PRACTICE.—*Appeal from orphans' court.*—An appeal from the orphans' court brings up all the evidence before that court, and, if the appellant fail to print all the evidence bearing on the questions he intends to ask the appellate court to decide, he is liable to have his paper-book quashed and his appeal dismissed.—*Solts' Appeal*, Sup. Ct. Pa., W. N. C., Sept. 13, p. 298.

— *Supersedeas—Final judgment—Motion to set aside.*—When, upon a petition for *mandamus*, a judgment is rendered granting the writ, and afterwards a motion is filed for a further peremptory *mandamus*, presenting a new question to the court, the order of the court granting the motion and not the original order for *mandamus*, is properly considered the final judgment of the court for the purposes of a writ of error; A motion to set aside a judgment, final in its nature, suspends the operation of that judgment so that it does not take effect for the purposes of a writ of error until the motion is disposed of.—*City of Memphis v. Brown*, Sup. Ct. U. S., C. L. J., Sept. 14, p. 240.

— *Counsel addressing jury.*—It is error for the presiding justice to permit counsel, in addressing the jury, against seasonable interposition, to proceed

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with his argument upon asserted facts not in evidence, and having no legitimate pertinency to the issue.—*Rolfe v. Inhabitants of Rumford*, Sup. Ct. Me., Am. L. Rec., Oct., p. 251.

—*Transfer of decree to another county.*—The decree of a court of equity for the payment of money is not equivalent in all respects to a common-law judgment; It only has the force and effect of such in Pennsylvania, for the purpose of lien and revival within the county in which it was entered; It cannot be transferred, like a judgment at law, to another county for lien and execution.—*Brooke et al. v. Phillips et al.*, Sup. Ct. Pa., W. N. C., Oct. 4, p. 327.

—*Forcible entry and detainer—Appeal, within what time to be taken—Motion to dismiss in supreme court.*—This was an appeal to the supreme court from the judgment of the circuit court, in an action of forcible entry and detainer. The bond for appeal was filed and approved within twenty days from the rendition of judgment, but not within five days thereafter; *Held*, that appeals to the supreme court, even in cases of forcible entry and detainer, are governed by the provisions of the practice act, and may be taken within such time (not less than twenty days) as may be fixed by the court; That the section of the statute, requiring appeals in forcible entry and detainer to be perfected within five days, refers to such appeals as carry the cause to another court for trial *de novo*.—Sup. Ct. Ill., C. L. N., Oct. 6, p. 20.

—*Filing replication.*—A replication of *non solvit* to a plea of payment with leave, with notice of special matter, is merely formal; the cause is substantially "at issue" under the rule of court relating to the issuing of the *venire*, and the formal replication may be filed at bar when the cause is called for trial.—*Bruner v. Gregg*, Sup. Ct. Pa., W. N. C., Oct. 25, p. 368.

—*Court terms.*—Power of courts to adjourn to a time after the commencement of another regular term, for the completion of a trial; Extension of civil and criminal terms.—*Jacques v. Bridgeport R. R. Co.* (with note), Sup. Ct. Conn., Am. L. Reg., Nov., p. 657.

—*Action to recover a penalty—Action qui tam—Arrest—Affidavit.*—The action provided for in secs. 3490-3493 of Rev. Stat., to recover a penalty and damages for making a false claim against the United States is a *qui tam* one, and may be commenced by any person who will, without the previous authority or consent of the district attorney of the United States, and therefore the complaint in such action need not be subscribed by such district attorney, but the same is sufficiently "subscribed by the party or his attorney" within the meaning of secs. 79 and 81 of the Oregon Civil Code, when it is "subscribed" by the attorney of the person who brings such action; In such an action the United States is the plaintiff, and the defendant may be arrested and held to bail without an undertaking on the part of the plaintiff to the defendant for damages, in case the arrest "be wrongful or without sufficient cause," as provided in sec. 107 of the Oregon Civil Code; If the facts necessary to authorize such an arrest sufficiently appear in the complaint in such action, and the same is verified by the oath of the informer or person bringing the same, it is an affidavit within the meaning of sec. 3492 aforesaid, and an order for the arrest of the defendant may be made thereon.—*United States v. Griswold*, U. S. Dis. Ct., D. Or., C. L. N., Nov. 3, p. 50.

—*Validity of a case made.*—Where an attempt is made to review, in the supreme court of this state, an action from the district court on a "case made," the record must affirmatively show the previous steps necessary to the settlement of the case, in the absence of the appearance or proper waiver by the opposing party; And the mere signature of the district judge to the paper, a copy of which is presented to this court, as a "case made," is not sufficient showing that the prerequisites to make the case a valid one were complied with.—*Weeks v. Medler*, Sup. Ct. Kan., C. L. J., Nov. 9, p. 410.

PUBLIC LANDS.—*Right to cut timber.*—The right to cut timber on the public domain, by homestead settlers, limited to purposes of cultivation.—*United States v. McEntee*, U. S. Dis. Ct., D. Minn., C. L. N., Oct. 27, p. 41.

RIPARIAN RIGHTS.—*Rights of owner of shore of navigable body of water—Intent of legislature.*—The owner of lots abutting on a navigable stream or body of water has rights therein differing in kind and degree from the rights of the public, and has an action for damages for injury thereto, although the water's edge is the boundary of his title; As proprietor of the adjoining land, the owner has the right of exclusive access to and from the body of water at that particular place, and all facilities which the location of his land with reference to the body of water affords he has a right to enjoy for purposes of gain or pleasure; Although the title to the bed of navigable waters is in the state, the legislature does not intend, by granting right of way across navigable waters to railroad companies, to relieve them from any common-law liability they may thereby incur towards private persons.—*Delaplaine v. Chicago, etc., Ry. Co.*, Sup. Ct. Wis., C. L. J., Sept. 21, p. 267.

— *Navigable waters.*—Limit of title of riparian owner; Such owner upon a natural lake or pond takes only to the natural shore thereof.—*Diedrich v. Northwestern, etc., Ry. Co.*, Sup. Ct. Wis., C. L. J., Sept. 21, p. 268.

SALES.—*Warranty.*—In a suit upon a promissory note the affidavit of defence alleged that the "deponent believes and expects to be able to prove" that the plaintiff held the note on account of the payee, without value or consideration; Further, that, previous to giving the note, defendant had bought from the payee a car load of window-shade rollers, which were of good quality: "that defendants then ordered another car load of rollers of the same kind and quality," and for this car load the note in suit was given; That this second car load proved inferior in quality to the first, whereby the defendant had sustained loss; The court below ordered a supplemental affidavit to be filed, and, this not being done, subsequently entered judgment for want of a sufficient affidavit of defence; *Held*, that the judgment was properly entered.—*Coulston v. City National Bank, etc.*, Sup. Ct. Pa., W. N. C., Sept. 18, p. 297.

— *Warranty.*—Representations by vendor as to quality or fitness for particular use intended as part of the contract, and relied on by vendee, constitute a warranty; Second-hand machine represented as "equal to new."—*Richardson v. Grandy*, Sup. Ct. Vt., Am. L. Reg., Nov., p. 687.

SET-OFF.—*Judgments not in same court.*—Court of equity may order judgments to be set-off against each other, even though the judgments are not in the same court; Assignee of judgment has no higher rights than the original owner; Set-off of assigned judgments.—*Brown v. Hendrickson*, Sup. Ct. N. J., Am. L. Reg., Oct., p. 619.

SLANDER.—*Privileged communications.* Words spoken by a clergyman from the pulpit concerning a parishioner, though in good faith and for a commendable purpose, are not privileged.—*Magrath v. Finn*, Irish Comm. Pleas, Alb. L. J., Sept. 15, p. 187.

— *Interpretation of language.*—*Quo animo*; Evidence; Remote injury; Rumor.—*Prime v. Eastwood*, Sup. Ct. Iowa, C. L. J., Sept. 28, p. 382.

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— *Extra territorial, application of.*—Where a railroad was incorporated separately by two states, a statute of one of them giving damages for injury by negligence will not be applied by its courts to an injury that occurred in the

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other state; Presumption of similarity of common law in the several states does not extend to statutory rights or remedies.—*State v. Pittsburg, etc.*, R. R. Co., Ct. App. Md., Am. L. Reg., Nov., p. 681.

TAXES.—*Common-school tax.*—The act of March 16, 1855 (P. L. 92), directing that the difference between the compensation then allowed by law for the collection of state and county tax, and that to be paid under the provisions of that act, should be paid into the common-school fund of Lancaster city, is not repealed by the act of April 21, 1869 (Purd. Dig. 247, pl. 77).—*Albright v. School District*, Sup. Ct. Pa., W. N. C., Sept. 13, p. 295.

—*City of Williamsport—Acts of April 1, 1872, and May 23, 1874, construed.*—The act of April 1, 1872, limiting the rate of taxation for city purposes in the seventh ward of the city of Williamsport, and classifying lands subject thereto, is not inconsistent with or repealed by the provisions of the act of May 23, 1874, relating to cities.—*Williamsport v. Brown*, Sup. Ct. Pa., W. N. C., Oct. 11, p. 339.

—*Militia tax.*—Acts of April 7, 1870, and April 15, 1873; Liability of county upon orders drawn by the military board; Pleading; Demurrer.—*Wyoming County v. Bardwell*, Sup. Ct. Pa., W. N. C., Oct. 18, p. 353.

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TRUSTS.—*Trustee de son tort.*—To whom accountable; Orphans' court has no jurisdiction to compel account by.—*Dolbert's Appeal* (No. 2), Sup. Ct. Pa., W. N. C., Sept. 13, p. 291.

—*Separate use.*—Remainder; Limitation and purchase; Rule in Shelley's case; When applicable.—*Pelerin v. Queripel*, Sup. Ct. Pa., W. N. C., Oct. 4, p. 380.

USURY.—*Defence on account of.*—Where usurious interest is paid, and afterwards the original judgment is revived without allowing credit for such payment, and the disputed portion of the proceeds of an execution thereon is paid into court, the defendant cannot avail himself of the defence of usury; He should have applied to the court to open the revived judgment.—*Rutherford v. Boyer*, Sup. Ct. Pa., W. N. C., Oct. 25, p. 364.

WILLS.—*Trusts under.*—Construction of; Trusts, whether active or executed; Trust to preserve corpus for contingent remainder-men; Appointment of new trustee by orphans' court.—*Dolbert's Appeal* (No. 1), Sup. Ct. Pa., W. N. C., Sept. 13, p. 289.

—*Devise.*—Construction of; Intention of testator; Creation of life estate by implication; A devise of real estate to "A, his heirs and assigns forever, subject, however, to the life estate of his father, B," creates a life estate in B. by plain implication.—*Lindsay v. Lindsay*, Sup. Ct. Pa., W. N. C., Oct. 18, p. 358.

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SOUTHERN LAW REVIEW

VOL. III, N. S.] ST. LOUIS, FEBRUARY, 1878. [NUMBER 6.

I. HOMESTEAD AND EXEMPTION LAWS—PRIVILEGED DEBTS.

I. Debts and Liens Subsisting Prior to the Taking Effect of such Laws.

II. Debts Created Prior to the Acquisition of the Homestead.

III. Liens Subsisting Prior to the Time when the Premises became Impressed with the Homestead Character.

IV. Debts Contracted in Removing Encumbrances.

V. Unpaid Purchase-money—The Vendor's Liens.

VI. Liens for Creation, Improvement, and Preservation of the Property—Mechanic's, Furnisher's, and Landlord's Liens.

VII. Judgments in Actions Ex Delicto.

VIII. Taxes, Fines, and other Public Dues.

IX. Effect of Changing the Form of Indebtedness—Exchange of Securities—Renewals.

Under the denomination of *privileged debts*, I shall classify in this article all debts and liabilities of a person which are exempted, by operation of law, from the effect of statutes and constitutional provisions which exempt from execution a homestead and personal property. Those debts which are privileged by express contract of the persons entitled to release or waive the benefit of the homestead or chattel exemption, such as debts secured by valid mortgages placed upon the homestead itself, or upon the chattel itself, are not within the scope of this article. By force of statutory or constitutional provisions, or by judicial construction, those debts and obligations named in the first eight subdivisions of this article have been declared *privileged* from the operation of such laws.

I. Debts and Liens Subsisting Prior to the Passage or Taking Effect of such Laws.

It is a settled principle that a statute will never be construed to operate retrospectively unless the intention of the legislature that it should so operate is unmistakable.¹ Although the courts of all the states agree that homestead and exemption laws are to be construed liberally, so as to advance the intention of the legislature,² it has been generally, though not universally, held that they will not be construed as having a retroactive effect unless their phraseology clearly points to such a conclusion.³ The rule is of greater obligation upon the courts where, by giving such statutes a retroactive effect, they would operate to disturb valid subsisting liens.⁴

This principle is found embodied in the legislation, and even in the fundamental law, of several of the states, in the shape of provisos to the effect that homestead and chattel exemptions shall not operate in case of debts contracted prior to the date of the particular constitution or the adoption of the particular statute,⁵ or, more frequently, in case of debts contracted or judgments obtained prior to a date named.⁶

¹ *Seamans v. Carter*, 15 Wis. 548; *Palmer v. Conly*, 4 Denio, 374; *Hitchcock v. Way*, 6 Ad. & E. 943; *Paddon v. Bartlett*, 3 Ad. & E. 884; *College of Physicians v. Harrison*, 9 Barn. & Cres. 554.

² It is not thought necessary to cite cases in support of a doctrine which is reiterated in nearly all the cases on the subject.

³ *Seamans v. Carter*, 15 Wis. 548; *Estate of Phelan*, 16 Wis. 76; *Dopp v. Albee*, 17 Wis. 590; *Succession of Taylor*, 10 La. An. 509; *Smith v. Marc.* 26 Ill. 150; *Ely v. Eastwood*, 26 Ill. 107.

⁴ *Dopp v. Albee*, 17 Wis. 590; *Milne v. Schmidt*, 12 La. An. 553; *Roupe v. Carradine*, 20 La. An. 244; *Succession of Foulkes*, 12 La. An. 537; *Tillotson v. Millard*, 7 Minn. 513; *McKeithan v. Terry*, 64 N. C. 25; *Shelor v. Mason*, 2 S. C. 233.

⁵ Arkansas—Const. 1868, art. 12, sec. 1. Indiana—Const. 1851, art. 1, sec. 22. Statute reads, "after July 4, 1852," debts privileged; see *Revision* 1876, vol. 2, p. 353, sec. 1. Arizona—"Not subject to forced sale on any debt contracted or incurred after thirty days from the passage of this act;" *Compiled Laws* 1864-1871, ch. 37, sec. 1. Montana—*Laws* 1872, p. 84, sec. 262. Wisconsin—As to personal property exemption, Act of 1859; see *Rev. Stat.* 1871, vol. 2, p. 1552, sec. 35.

⁶ Alabama—Prior to July 13, 1868, or after ratification of constitution; see

The constitution of the United States⁷ declares that no state shall pass any law impairing the obligation of contracts. In *Bronson v. Kinzie*,⁸ Chief Justice Taney used the following language: "It [a state] may, if it thinks proper, direct that the necessary implements of agriculture, tools of the mechanic, or articles of necessity in household furniture shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy to be exercised or not by every sovereignty, according to its own views of policy and humanity. It must reside in every state, to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community. And, although a new remedy may be deemed less convenient than the old one, and may, in some degree, render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional." And Woodbury, J., in delivering the opinion of the same court in *Planters' Bank v. Sharp*,⁹ enumerates laws exempting tools and household goods from seizure as not within the constitutional prohibition.

These unfortunate *dicta*, made in cases in which the ques-

Const. 1875, art. 10, sec. 1. Statute reads, prior to April 23, 1873; see Statutes 1876, sec. 2820. Colorado—Debts contracted prior to February 1, 1868; Rev. Stat. 1868, ch. 48, sec. 57. Delaware—Debts contracted prior to July 4, 1851; Rev. Code 1852, ch. 111, sec. 2. Michigan—Debts contracted prior to July 3, 1858; Compiled Laws 1871, sec. 6137. Const. 1850, art. 16, sec. 2, reads, property exempt for "debts contracted after its adoption." Mississippi—Debts contracted prior to September 1, 1870; Rev. Code 1871, sec. 2145. New Jersey—On "a judgment obtained prior to March 14, 1851;" Rev. Stat. 1874, p. 286, sec. 10. Nevada—Debts contracted prior to November 13, 1861; Compiled Laws 1871, vol. 1, p. 60, sec. 186. Pennsylvania—Debts contracted prior to July 4, 1849; Bright. Purd. Dig., vol. 1, p. 638, sec. 24. Virginia—Debts contracted prior to April 4, 1865; Code 1873, ch. 183, sec. 2. Wisconsin—Debts contracted prior to January 1, 1849; Statutes 1871, vol. 2, p. 1548, sec. 23.

⁷ Art. 1, sec. 10.

⁸ 1 How. 311.

⁹ 6 How. 318.

tion did not arise, and in a court in which it never had arisen, led some of the state legislatures into the error of passing homestead and exemption laws retroactive in their terms; led some of the state courts into the error of giving a retroactive effect to such laws where such a construction was not required by their terms;¹⁰ and passed unchallenged into the text of an eminent writer as a part of the constitutional law of this country.¹¹ And some courts even went to the length of holding that such laws were valid, even where they displaced the liens of judgments,^{11*} or those created by the levy of attachment,¹² or even those of mortgages subsisting prior to the date of their passage;¹³ and one even declared that all the property in the state might have been withdrawn from forced sale under a provision of the state constitution.¹⁴

In other cases in the Supreme Court of the United States, where similar questions have arisen,¹⁵ the doctrine thus announced in the *dicta* of Taney and Woodbury, JJ., has been in effect overruled. But it was not until the year 1871 that the question came directly before that tribunal for

¹⁰ Snider v. Heidelberg, 45 Ala. 126; Hardeman v. Downer, 39 Ga. 425; Pulliam v. Sewell, 40 Ga. 73; Gunn v. Barry, 44 Ga. 353; Cook v. McChristian, 4 Cal. 23; Morse v. Goold, 11 N. Y. 281 (overruling Quackenbush v. Danks, 1 Denio, 128); Rockwell v. Hubbell, 2 Dougl. (Mich.) 198; Putnam, J., in Bigelow v. Pritchard, 21 Pick. 174; Hill v. Kessler, 63 N. C. 437; *Re* Kennedy, 2 S. C. 216; Stephenson v. Osborne, 41 Miss. 119; Baylor v. San Antonio National Bank, 38 Tex. 448; Cusic v. Douglas, 3 Kan. 123; Root v. McGrew, 3 Kan. 215; Grimes v. Bryne, 2 Minn. 89.

¹¹ Cooley Const. Lim. (2d ed.) 305.

^{11*} *Re* Kennedy, 2 S. C. 216; Gunn v. Barry, 44 Ga. 353.

¹² Snider v. Heidelberg, 45 Ala. 126.

¹³ Chambliss v. Phelps, 39 Ga. 386.

¹⁴ Cook v. McChristian, 4 Cal. 23. In the Homestead Cases, 22 Gratt. 266, Christian, J., in discussing this question, showed that if all the property existing within the limits of the state of Virginia were equally divided among the householders or heads of families, all of it, and much more, would be exempt under the homestead law of that state; from which he concluded that to give such a law a retroactive effect would be "absolute repudiation." The calculations made by Judge Christian would apply equally well to the homestead laws of many of the western and southern states.

¹⁵ McCracken v. Hayward, 2 How. 608; Walker v. Whitehead, 16 Wall. 317; Von Hoffman v. Quincy, 4 Wall. 550.

decision, when it was finally settled—as firmly as a single decision of the highest jurisdiction entitled to pass upon a question can settle it—that a homestead or other exemption law, in so far as it attempts to withdraw from the reach of creditors property which would have been within their reach under the laws in force at the time of the contracting of the debt, and especially in so far as it attempts to divest valid liens existing at the date of its passage, is unconstitutional and void.¹⁶

¹⁶ *Gunn v. Barry*, 15 Wall. 610 (reversing *Gunn v. Barry*, 44 Ga. 353). In this case a creditor had obtained a judgment, which, by the laws of Georgia, became a lien upon the property of the debtor, which he subsequently claimed as his homestead, upon a debt contracted prior to the adoption of the constitution of 1868, by which the then existing homestead exemption was greatly increased; and, in the opinion of the Supreme Court of the United States, delivered by Mr. Justice Swayne, great stress is laid upon the fact that the state constitutional ordinance, as upheld by the state court, operated to uproot a lien, and thus to divest a vested right. But since the Supreme Court of the United States has held that a state law is not in derogation of any provision of the constitution of the United States simply because it divests a vested right, provided that it does not also impair the obligation of a contract (*Beers v. Haughton*, 9 Pet. 359; *Watson v. Mercer*, 8 Pet. 88), it follows that these remarks of the learned justice were only collateral to the real point involved, namely, that the ordinance, as constructed by the court below, impaired the obligation of the creditor's contract; and the decision was so construed by the supreme court of Georgia, in *Jones v. Brandon*, 48 Ga. 593, and the courts of this and other states in which the question has subsequently arisen have yielded obedience to it as an authoritative exposition of this principle. *Chambliss v. Jordan*, 50 Ga. 81; *Wofford v. Gaines*, 53 Ga. 485; *Gunn v. Thornton*, 49 Ga. 380; *Clark v. Trawick*, 56 Ga. 359; *Larence v. Evans*, 50 Ga. 216; *Whittenton v. Colbert*, 50 Ga. 584; *Grant v. Cosby*, 51 Ga. 460; *Smith v. Whittle*, 50 Ga. 626; *Burnside v. Terry*, 51 Ga. 186; *McPhee v. Guthrie*, 51 Ga. 83; *Smith v. Ezell*, 51 Ga. 570; *Pratt v. Atkins*, 54 Ga. 569; *Wheeler v. Redding*, 55 Ga. 87; *Bush v. Lester*, 55 Ga. 579; *Lessley v. Phipps*, 49 Miss. 790; *Pennington v. Seal*, 49 Miss. 528; *The Homestead Cases*, 22 Gratt. 266; *Russell v. Randolph*, 26 Gratt. 705; *Cochran v. Darcy*, 5 S. C. 125; *s. c.*, 1 C. L. J. 179; *Ex parte Hewett*, 5 S. C. 409; *De La Howe v. Harper*, 5 S. C. 470. The supreme court of North Carolina, while admitting the binding authority of *Gunn v. Barry*, hold that it does not apply to their constitutional ordinance adopted in 1868, because this differs from that of Georgia in that it restricts rather than increases the previously-existing exemption. But they understand *Gunn v. Barry* to go no further than to hold that such ordinances are invalid where they operate to divest a *vested right*, such as a judgment lien; a supposition which is manifestly erroneous, unless

It follows that debts contracted prior to the passage of a homestead or exemption law are, as to the exemption created by such law, *privileged debts*.¹⁷

II. Debts Created Prior to the Acquisition of the Homestead.

By statute in some of the states the homestead exemption does not exist as against "debts contracted prior to the purchase thereof,"¹⁸ nor against debts or liabilities "incurred for the purchase or improvement thereof;"¹⁹ nor, as expressed in another statute, "if the debt or liability existed prior to the purchase of the land or the erection of improvements thereon;"²⁰ nor, as expressed in still another statute, "against debts existing at the time the deed thereof"—that is, of the homestead premises—"was left for record."²¹

The obvious design of these statutes is that a debtor shall not acquire credit upon the faith of being the owner of property subject to execution, and afterwards, by converting such property into a homestead, withdraw it from such creditors. The Iowa statute has been construed to apply to debts contracted in another state prior to the purchase of a homestead in that state,²² the court reasoning that it is contrary to sound policy to make the state an asylum for fraudulent debtors fleeing from other states. If a person were to acquire credit upon the faith of being the owner of real property which was not recorded or occupied as his homestead, and hence liable to execution, and should afterwards attempt to withdraw it from his creditors by occupying and claiming it as a homestead, a case would be presented obviously within

such vested right inheres in a contract in such a manner that a state law or constitutional ordinance which destroys it impairs also the obligation of the contract. *Garrett v. Cheshire*, 69 N. C. 396; see, also, *Wilson v. Sparks*, 72 N. C. 208; *Edwards v. Kearsey*, 74 N. C. 241.

¹⁷ As to when a debt is deemed to have been contracted, and the effect of exchanging securities and renewing notes, see subdivision IX, *post*.

¹⁸ Code of Iowa (ed. of 1873), sec. 1992; Revision of 1860, sec. 2281.

¹⁹ Rev. Stat. Ill., 1874, p. 497.

²⁰ Gen. Stat. Ky., 1873, p. 434, sec. 16.

²¹ Gen. Stat. Vt. (App. of 1870), ch. 68, sec. 7.

²² *Laing v. Cunningham*, 17 Ia. 510; *Brainard v. Van Kuran*, 22 Ia. 264.

the mischief which these statutes are designed to remedy. Accordingly, the supreme court of Iowa, carrying out the spirit of their statute, have held that, where the head of a family acquires real estate, and, before its actual occupancy as a homestead, contracts a debt, and then occupies the land as a homestead, and, after such occupancy, a judgment is rendered upon the debt, this judgment will subject the property to sale; ²³ and, therefore, a mortgage of such homestead, made by the owner and his wife in the manner prescribed by the statute subsequently to the rendering of the judgment, was postponed to the judgment.²⁴

But this rule does not operate to prevent a debtor from *changing* his homestead from one tract of land to another, so that the change does not withdraw from the reach of his creditors land of a greater value than was before subject to their demands. Accordingly, if a debtor has acquired a homestead before contracting a particular debt, sells it after contracting such debt, and purchases other land of less value than such homestead, which latter he occupies as his home, this new homestead will be exempt from sale to satisfy the debt.²⁵ These decisions are aided by a provision of the homestead law of that state to the effect that the debtor may change his homestead, provided such change shall not prejudice conveyances or liens made or created previously to such change—a statute which we shall notice in the next subdivision.²⁶

But, where the statute provides for the making and recording, in the office where conveyances of land are required to be recorded, of a *declaration* on the part of the owner of land that he intends to hold the same as his homestead, it is a reasonable conclusion that, in the absence of actual fraud,

²³ Page v. Ewbank, 18 Iowa, 580; Hale v. Heaslip, 16 Iowa, 451. Cole, J., dissented in an able opinion, holding that the word "purchase," used in the statute, meant the act of acquiring *title* to the land, and not the mere act of impressing it with the homestead character by occupying it as such.

²⁴ Hale v. Heaslip, *supra*.

²⁵ Pearson v. Minturn, 18 Iowa, 36; Sargent v. Chubbuck, 19 Iowa, 37.

²⁶ *Post*, p. 829.

he can hold it against debts contracted after the filing of such declaration for record, but before the date of visible occupancy as a homestead, provided he is in occupancy of it at the time the attachment or execution is levied; and there are cases pointing to this view, although the grounds upon which they are placed are not very clear.²⁷

But, where the statutes on the subject are silent, can a debtor, being insolvent, purchase a homestead, and thereby withdraw from his creditors money which would otherwise be distributed among them? Obvious as the answer to this question would seem to be, the courts are divided upon it.²⁸ The cases have been examined at length in a recent article in the *Central Law Journal*, to which the reader is referred.²⁹ It may be added, however, that the governing principle appears to be the same as that which obtains with reference to voluntary conveyances by an insolvent debtor prior to the passage of homestead laws. In the absence of such a law, a debtor, being insolvent, could not, under the disguise of a gift to his wife, child, or other person, secure to himself and family a homestead out of property on the faith of which he had obtained credit; and we doubt if anything can be found in the homestead laws of the different states indicating a clear intention to change this salutary rule, whereas, as already seen, there are provisions in some of these laws declaring the contrary.

III. Liens Subsisting Prior to the Time when the Premises became Impressed with the Homestead Character.

If a simple contract debt, created at a time when the creditor has not had the notice required by law that the debtor

²⁷ *West River Bank v. Gale*, 42 Vt. 29; *Lamb v. Mason*, 45 Vt. 500; *Robinson v. Wiley*, 15 N. Y. 489. *Shindler v. Givens*, 63 Mo. 394; *Lincoln v. Rowe*, 64 Mo. 138.

²⁸ The following cases hold, in effect, that he can: *Randall v. Buffington*, 10 Cal. 491; *Cipperly v. Rhodes*, 53 Ill. 346; *North v. Shearn*, 15 Tex. 174; *Edmondson v. Meacham*, 50 Miss. 35. And the following hold that he cannot: *Riddell v. Sherley*, 5 Cal. 488; *Pratt v. Burr*, 5 Biss. 36; *McWright*, 3 Biss. 359.

²⁹ 5 C. L. J. 480.

has withdrawn a certain portion of his land from exemption by making it his homestead, will bind such homestead, *a fortiori* a valid lien placed upon land before it acquires the character of homestead will not be subsequently impaired by the debtor occupying such land as his homestead, or, in those states where such a proceeding is required, by filing the statutory declaration of homestead. If the legislature of a state cannot divest such a lien, it is pretty clear that a private individual can do no act which will have this effect, even in a country where every citizen is deemed to be in some sense a "sovereign." Plain as this conclusion would seem to be, the question has been thrust in the face of courts again and again.³⁰ But in Mississippi and Texas this rule has not been extended to the case of the statutory lien of a judgment upon the realty of the debtor. Accordingly it has been held in those states that the exemption accrues to the judgment debtor if he occupies the premises as his homestead at any time before the sale.³¹ But in Minnesota it is

³⁰ *Kurz v. Brusch*, 13 Iowa, 371; *Lucas v. Pickel*, 20 Iowa, 490; *McCormick v. Wilcox*, 25 Ill. 274; *Ely v. Eastwood*, 26 Ill. 107; *Smith v. Marc*, 26 Ill. 150; *Potshuiskey v. Krempkan*, 26 Tex. 307; *Chipman v. McKinney*, 41 Tex. 76; *Rix v. McHenry*, 7 Cal. 89; *Elston v. Robinson*, 21 Iowa, 531; *In re Haake*, 7 N. B. R. 60, 70; *Tuttle v. Howe*, 14 Minn. 145, 152. Upon a like principle a contract to convey land not occupied as a homestead, made by a married man, his wife not concurring, cannot be avoided on the ground that the premises have been subsequently adopted as a homestead, and that the wife refuses to join in the deed; and in such a case the obligee will be entitled to specific performance. *Yost v. Devault*, 3 Iowa, 345. Upon similar grounds, where a judgment existed against the debtor prior to his filing the statutory declaration of homestead, and suit was brought upon it after the filing of such declaration, and a second judgment recovered thereon, a homestead was not exempt from an execution for the costs of the second action, since these costs flowed out of, or inhered in, the prior judgment, and it was the debtor's fault that by not paying it he had driven the creditor to a second action upon it. *Mills v. Spaulding*, 50 Me. 57.

³¹ *Trotter v. Dobbs*, 38 Miss. 198; *Irwin v. Lewis*, 50 Miss. 363; *Letchford v. Carey*, 52 Miss. 791; *Stone v. Darnell*, 20 Tex. 11; *McManus v. Campbell*, 37 Tex. 267. In *Trotter v. Dobbs* the judgment debtor occupied the premises in question as his house for about a year before the sheriff's sale took place; but, being a single man, he was not entitled to the exemption, under the laws of Mississippi. But on the day of the sale, and an hour or two before it actually took place, goaded, no doubt, to the pitch of despera-

held that the owner of land cannot, by making it his homestead, defeat the lien of an attachment previously levied. "The right to sell," say the court, "is fixed by the seizure. Such right is, from the time the lien attached by the seizure, a vested right, and property. In this respect there is no difference between a lien secured by a levy of an attachment and one secured by the docketing of a judgment or the levy of an execution, except that it may be defeated by the dissolution of the attachment or the failure to obtain judgment. There is no reason to suppose, from the language either of the constitution or the statute, that it was intended to give the debtor the power, by his own acts, to deprive others of rights previously obtained in his property."^{31*}

There is a single case holding that, where a planter mortgaged his plantation before it became his homestead, he at the time residing in another parish, he might afterwards occupy it as his homestead, and assert a right of homestead in it as against the mortgagee. The inventive genius of the court discovered the following reason for so holding: "The law confers the right, and the law existed at the time the mortgage was granted. The defendants accepted the mortgage subject to the contingency that might arise in the future, rendering it necessary for the mortgagor to avail himself of the benefit of the homestead law."³²

The statute of Iowa defining the homestead provides that

tion by his heartless creditor, he *got married*, and thus became suddenly transformed into the "head of a family," and entitled to the benefit of the statute. In *Irvin v. Lewis* the debtor, with the experience of Trotter before him, and having an eye to business or pleasure, or both, resorted successfully to the same expedient, after the levy of the execution, and before the issuing of the writ of *venditioni exponas*. This contagious example even extended into another state: *North v. Shearn*, 15 Tex. 174. In *Stone v. Darnell* it is intimated by Hemphill, Ch. J., that there may be exceptions to this rule—"as, for instance, where one removes from his former homestead, and fixes his residence on a portion of his land upon which there had been a levy. Such proceeding would be regarded as fraudulent, which might be shown by the purchaser at the sheriff's sale, and would protect his title against the claim of the homestead thus fraudulently acquired."

^{31*} *Kelly v. Dill*, 23 Minn. 435.

³² *Fuqua v. Chaffe*, 26 La. An. 148, opinion by Taliaferro, J.

the owner may, from time to time, *change* the limits of his homestead by changing the metes and bounds as well as the record of the plat or description, or may change it entirely; but such change shall not prejudice conveyances or liens made or created previously thereto.³³ It is held in that state that, if the lien of a judgment has attached to land before it has acquired the character of a homestead, the judgment debtor cannot, in consequence of this statute, by changing his homestead from another tract to the tract thus subject to the judgment lien, displace the same; and, hence, a sale under the judgment will pass a good title.³⁴ And it is immaterial whether the debt upon which the judgment was rendered was contracted before or after the purchase of the tract in which the second homestead is claimed.³⁵

Upon similar grounds, if a person mortgages land to secure a present loan and also *future advances*, and afterwards declares a homestead upon it in pursuance of a statute, and, without disclosing this fact to the mortgagee, subsequently obtains further advances upon the faith of the security of the mortgage, he cannot sustain a claim of homestead in such premises as to advances made since the declaration of the homestead, unless the mortgagee had *actual notice* of such declaration. The rule is said to be that a mortgagee in a mortgage to secure future advances will be protected in making such advances, as against a subsequent encumbrancer, unless he has had actual notice of the subsequent encumbrance;³⁶ and a mortgagor in such a mortgage who has declared a homestead upon the mortgaged premises, and then fraudulently obtained further advances, cannot stand in a better position.³⁷

³³ Iowa Code of 1873, sec. 2000; Revision of 1860, sec. 2288; Code of 1851, sec. 1255.

³⁴ Elston v. Robinson, 21 Iowa, 531.

³⁵ *Ibid.* Compare Pearson v. Minturn, 18 Iowa, 36, and Sargent v. Chubbuck, 19 Iowa, 37.

³⁶ Thomas v. Craig, 7 Cranch, 34; Stuyvesant v. Hall, 2 Barb. Ch. 159; Truscott v. King, 6 Barb. 346; Frye v. Bank of Illinois, 11 Ill. 381.

³⁷ *Re Haake*, 7 N. B. R. 60, 70.

IV. Debts Contracted in Removing Encumbrances.

The constitution of Georgia, adopted in 1868,³⁸ and the homestead law of that state founded thereon,³⁹ after defining the homestead exemption, provide that "no ministerial officer within this state shall ever have jurisdiction or authority to enforce any judgment, decree, or execution against said property so set apart, including such improvements as may be made thereon from time to time, except for taxes, money borrowed and expended in the improvement of the homestead, or for purchase-money of the same, and labor done thereon, or material furnished therefor, or in *removal of encumbrances thereon.*" Notwithstanding this plain and unequivocal language, the supreme court of that state started out by holding that this ordinance and statute cut up by the roots mortgages placed on the property prior to its passage, unless such mortgages were given for unpaid purchase-money, holding that ordinary mortgages were not within any of the above exceptions, although they had previously passed to judgment of foreclosure.⁴⁰ This extraordinary doctrine was overthrown, as we have already seen, by the Supreme Court of the United States, in *Gunn v. Barry*.⁴¹ So that *Chambliss v. Phelps* continues to have importance only as determining that a mortgage not given for purchase-money, or other privileged debt, is not within the exception concerning the removal of encumbrances. But, while thus holding that a preëxisting mortgage which had passed into judgment was not privileged as against the homestead, the court at the same time held that a debt contracted in paying off such a mortgage would be,⁴² which, at first blush, seems absurd; but, of course, if the encumbrance so removed had been superior to the right of homestead *at the time when it*

³⁸ Art. 7, sec. 1; Georgia Code of 1873, sec. 5135.

³⁹ Georgia Code of 1873, sec. 2002.

⁴⁰ *Chambliss v. Phelps*, 39 Ga. 386. Warren, J., dissented, holding that a mortgage other than for purchase-money was an "encumbrance" under the statute, which the debtor was bound to discharge before he would be entitled to his homestead.

⁴¹ 15 Wall. 610.

⁴² *Kelly v. Stephens*, 39 Ga. 466.

was removed, a debt incurred in its removal would necessarily be privileged; and in a subsequent case the court so ruled.⁴³ Upon this ground the judgment in the former case seems reasonable; for the debt was contracted in 1859, in discharging an encumbrance which bound the homestead by the law as it then stood, and under which the homestead was about to be sold. So, in the second case, the mortgage was given to discharge a prior mortgage which bound the homestead, namely, a mortgage for purchase-money.

At length the court, in another case, succeeded in reaching the manifest meaning of the constitutional provision by declaring that "it means an encumbrance, not in name, but fact; an encumbrance which, unless removed, would sell the homestead."⁴⁴

17. *Unpaid Purchase-money—Vendor's Lien.*

Most of the statutes of the different states which exempt homesteads and personal property from forced sale provide that the exemption shall not operate against process issuing upon a judgment obtained for money due for the purchase of the particular property claimed as exempt.⁴⁵ In

⁴³ *Hawks v. Hawks*, 46 Ga. 204.

⁴⁴ *Griffin v. Treutlen*, 48 Ga. 148. "The stream," said the court in this case, "cannot rise higher than the fountain. It would seem to be absurd to say that, if a debt exist which is not a *good* encumbrance on the homestead, a debt contracted to pay that shall be a good encumbrance."

⁴⁵ *Arkansas*—As to homestead, Stat. 1874, ch. 56, sec. 2625. *Arizona*—As to homestead where mortgage is given for purchase-money, even without consent of wife, see Compiled Laws 1871, ch. 37, sec. 2. *California*—As to homestead, Civil Code, p. 339, sec. 1241. *Colorado*—As to personal property exemption, Rev. Stat. 1868, ch. 48, sec. 33. *Dacota*—As to homestead, Rev. Code 1877, p. 183, sec. 5. *Georgia*—*Ibid.*, Code 1873, sec. 2002. *Illinois*—As to homestead and personal property exemption, Rev. Stat. 1877, ch. 52, sec. 3. *Indiana*—As to homestead, Stat. 1876, vol. 2, ch. 11, sec. 4. *Iowa*—As to personal property exemption, Code 1873, sec. 3077. *Kansas*—As to homestead, Gen. Stat. 1868, ch. 38, sec. 1; Const., Art. 15, sec. 9. *Kentucky*—*Ibid.*, Gen. Stat. 1873, ch. 38, Art. 13, sec. 9. *Louisiana*—As to homestead and personal property exemption, Stat. 1870, vol. 1, p. 701, sec. 2. *Massachusetts*—As to homestead, Gen. Stat. 1860, ch. 104, sec. 5. *Michigan*—As to homestead where mortgage is made for purchase-money, even without assent of wife; as to personal property exemp-

some of the states, where the statutes governing the particular case make no such exception, the courts have made it.⁴⁶

The reason of the rule has been said to be that a homestead is *not acquired*, within the meaning of the law, until title to the land on which it is sought to be established has been acquired, or, at any rate, until the party setting up the claim of homestead is in a condition to demand title; that all liens acquired before the homestead has been established must be raised by the claimant of the right of homestead, or it will be sold to satisfy such liens; and that a person holding land under a bond for title has no title, and cannot demand title until his vendor has been paid.⁴⁷ "We have held in repeated cases in favor of the vendor," said a Texas judge, "that his vendee, as against him, could not claim the

tion, excepting mechanical tools and implements of husbandry, Compiled Laws 1871, vol. 2, sec. 6138. Minnesota—*Ibid.* as to homestead; personal property not exempt where debt contracted in purchase thereof, Bissell Stat. at Large, ch. 32, title 5, sec. 166; and, also, ch. 116, title 11, sec. 223. Mississippi—As to homestead and personal property exemptions, Rev. Code 1871, sec. 2142. Nevada—As to homestead and personal property exemptions, also where mortgage is made for purchase-money of homestead, the wife assenting, Compiled Laws 1873, vol. 1, p. 61, sec. 187. New Jersey—As to personal property exemption, Rev. Stat. 1874, p. 286, sec. 10. New York—As to homestead and personal property exemption, Edmonds' Stat. at Large, vol. 4, p. 633, sec. 2. New Hampshire—As to homestead where mortgage is given for the purchase-money, even without assent of wife, Gen. Stat. 1867, ch. 124, sec. 2. Vermont—*Ibid.*, Gen. Stat. 1862 (App. 1870), ch. 68, sec. 10. North Carolina—As to homestead and personal property exemptions, Battle's Revision 1873, ch. 55, sec. 1. Oregon—*Ibid.*, Gen. Stat. 1872, ch. 3, sec. 279. South Carolina—*Ibid.*, Const., Art. 2, sec. 32. Tennessee—As to homestead, Stat. 1871, vol. 1, sec. 2114 *a*. Pennsylvania—"Bonds, mortgages, or other contracts for the purchase-money," Bright. Purd. Dig., vol. 1, p. 638, sec. 22. Texas—As to homestead, Const., Art. 12, sec. 15. Virginia—As to homestead and personal property exemptions, and where mortgage is given on former for purchase-money, even without consent of wife, Code 1873, ch. 183, sec. 1. West Virginia—As to personal property exemption, Code 1868, ch. 41, sec. 28. Wisconsin—*Ibid.*, Rev. Stat. 1871, vol. 2, p. 1551, sec. 11.

⁴⁶ Farmer v. Simpson, 6 Tex. 303; Stone v. Darnell, 20 Tex. 14; Shepherd v. White, 11 Tex. 354; Barnes v. Gay, 7 Iowa, 26; Christy v. Dyer, 14 Iowa, 438; Burnap v. Cook, 16 Iowa, 149; Cole v. Gill, 14 Iowa, 527; Skinner v. Beatty, 16 Cal. 156; *Re* Whitehead, 2 N. B. R. 599.

⁴⁷ Farmer v. Simpson, 6 Tex. 310.

exemption, or be shielded under it, from the payment of the purchase-money; but this was on the ground that, until such payment, the superior right or title in the land remained in the vendor; that the title in fact had not fully vested in the vendee until the discharge of the purchase-money; that the claim of the homestead is based on the fact that the land, as against the vendor, is held by an indefeasible title."⁴⁸

Upon the same principle the same court has held that a *resulting trustee* cannot assert a homestead right in lands purchased with the money of another, as against the person by whom such money was furnished. "If it was a resulting trust," said the court, "and the nominal grantee held the land for the use of the real purchaser, the trustee could not acquire upon the land a homestead free from, and unencumbered by, the trust. He could not claim the protection of the homestead law, any more than he could if he had been a real purchaser and taken the deed absolute, but given a mortgage of the land so purchased, to his vendor, to secure the purchase-money."⁴⁹

In Iowa a different reason has been given for the rule. The statute of that state provided that the homestead might be sold for debts contracted *prior to its purchase*,⁵⁰ and debts contracted for the purchase of a homestead are held to be embraced in this language, since the agreement to buy, and the corresponding promise to sell, are made before the title-papers pass, and the final obligation to pay arises at the time of finally consummating the contract, when the notes have been passed and the deed made.⁵¹ But in a case in Massachusetts it was said that a note given for the purchase of land could not be regarded as "a debt contracted previous to the purchase thereof," and was not, therefore, within the statute of that state.⁵² In a later case, however, the same

⁴⁸ Hemphill, Ch. J., in *Stone v. Darnell*, 20 Tex. 14.

⁴⁹ *Shepherd v. White*, 11 Tex. 354, opinion by Lipscomb, J. See, also, the reasons given in *McWhitehead*, 2 N. B. R. 594, as applicable to a case where a mortgage had been given to secure unpaid purchase-money.

⁵⁰ Revision of 1860, sec. 2281.

⁵¹ *Christy v. Dyer*, 14 Iowa, 441.

⁵² *Thurston v. Maddocks*, 6 Allen, 429; Mass. Stat. of 1855, ch. 238, sec. 3.

court correct this manifest error (but without advertg to the former case) by holding that, if the purchaser of a homestead, on the day of receiving his deed, borrows money which he applies in part payment thereof, and shortly afterwards, on the same day, executes a note for the money so borrowed, the note is to be regarded as relating back to the time of the actual loan, and as an existing debt at the time of the purchase of the homestead.⁵³

Upon a like principle, a mortgage given for the purchase-money of land, executed simultaneously with the deed, takes precedence of a judgment against the mortgagor. The execution of the deed and of the mortgage being simultaneous acts, the title to the land does not for a single moment vest in the purchaser, but merely passes through his hands and vests in the mortgagee, without stopping at all in the purchaser, and during such instantaneous passage the judgment lien cannot attach to the title.⁵⁴ And the principle is the same where the mortgage is made to another person than the vendor, who has advanced, either in money or in goods,⁵⁵ the means to purchase the property. Similar views were held by the supreme court of California as applicable to a case where land was purchased entirely on credit, and a mortgage given for the purchase-money. In such a case the court hold that no homestead right attaches at all; that the wife of the purchaser acquires neither an equitable nor a legal right of homestead in the premises. And, in support of this conclusion, the court appeal to the familiar doctrine that a statutory seisin for an instant, when the same act that gives the estate to the husband conveys it out of him, as in the case of a conusee of a fine, is not sufficient to give the wife dower, nor is the seisin sufficient for this purpose where the husband takes a conveyance in

⁵³ *Stevens v. Stevens*, 10 Allen, 146.

⁵⁴ *Curtis v. Root*, 20 Ill. 57. "This," said Caton, J., "is the reason assigned by the books why the mortgage takes precedence of the judgment, rather than any supposed equity which the vendor might be supposed to have for the purchase-money; though that consideration might have originated the rule at first."

⁵⁵ *Ibid.*; *Austin v. Underwood*, 37 Ill. 438.

fee and at the same time mortgages the land back to the grantor to secure the purchase-money, in whole or in part.⁵⁶

This view is in substantial accord with that of the Texas court above quoted; and the resulting principle may be formulated thus: *Until the purchase-money is paid, the purchaser has not such an estate in land as will support the homestead right against the person to whom the purchase-money is due.*

It need hardly be suggested that the lien of a vendor for unpaid purchase-money, whether arising by contract of the parties or by operation of law, does not wholly displace the right of homestead, but exists as an encumbrance upon it. As against all other persons save the vendor, the right is perfect; and it does not lie in the mouths of such persons to appeal to the superior right of a vendor in order to support some supposed right of their own. As long as he is content to waive his rights, they cannot complain.⁵⁷

But what is purchase-money? This question would seem to be a very simple one, but it is one about which there is much confusion and conflict. I shall consider in succession several questions which have arisen.

1. Suppose a vendor has sold land upon a credit, and there have been several subsequent conveyances, is his lien for his unpaid purchase-money still paramount to the right of homestead existing in the last vendee? In Georgia this question has been answered in the affirmative, under a statute⁵⁸ providing that an exemption taken under a previously-existing statute⁵⁹ should be subject to demands for unpaid purchase-money. And it was so held, although the last vendee had paid his immediate vendor in full, and taken a deed for the premises.⁶⁰ And where, in such a case, the last

⁵⁶ *Lassen v. Vance*, 8 Cal. 271. See 4 Kent's Com. 39; *Clark v. Munroe*, 14 Mass. 351; *Holbrook v. Finney*, 4 Mass. 566.

⁵⁷ *Clark v. Trawick*, 56 Ga. 359; *Smith v. Whittle*, 50 Ga. 626; *McHendry v. Reilly*, 13 Cal. 75; *Hopper v. Parkinson*, 5 Nev. 233.

⁵⁸ Act of February 27, 1874.

⁵⁹ Georgia Code of 1873, sec. 2040.

⁶⁰ *Sparger v. Cumpton*, 54 Ga. 355.

vendee, after judgment, execution, and levy, by the first vendor, settled with him by a certain agreement which was made the decree of the court, under which settlement he delivered to him two negotiable notes, and received a release from him of all his right, title, and interest in and to the premises, and these notes passed into the hands of a third person, who prosecuted a suit thereon to judgment, it was held that this judgment was for purchase-money within the meaning of the statute, and that the defence of homestead was not available against an execution founded thereon.⁶¹ It is to be inferred from the facts of this case that the last vendee did not occupy the position of a *bona fide* purchaser without notice, since the first vendor executed only a title bond for the property. The court, however, makes no mention of this point in its opinion. But in a subsequent case in the same state, where A conveyed land to B by a warranty deed, taking a note for the purchase-money, and B, for the purpose of defeating the collection of the note, conveyed the land to a *bona fide* purchaser without notice, in exchange for other land, and induced his wife to have this land set apart as a homestead, and the vendor, having obtained judgment, filed a bill in equity to subject this homestead property, the court said that, if the debt had been contracted after the adoption of the constitution of 1868, creating the existing homestead exemption, it would have sustained the complainant's bill; but, inasmuch as the indebtedness was contracted prior to that constitution, so that it was privileged against the homestead under the rule in *Gunn v. Barry*,⁶² the complainant's remedy was to levy his execution upon the land so claimed as a homestead, or to proceed against the sheriff in the event of his refusal to levy.⁶³

2. Does the assignee of a note given for purchase-money

⁶¹ *Ibid.* Another element entering into this result was that the original indebtedness was contracted prior to the Georgia constitution of 1868, and was, hence, protected from the homestead exemption created by that instrument, by the rule in *Gunn v. Barry*, 15 Wall. 610.

⁶² 15 Wall. 610.

⁶³ *Greenway v. Goss*, 55 Ga. 588.

succeed to the privilege of the vendor as against the right of homestead of the vendee? It is apparent that this question is in substance the same as the question, Is the lien of a vendor assignable? and an answer to the latter question ought to be an answer to the former. But the courts are divided upon the question whether the assignment of a note given for the purchase-money of land, or other evidence of such an indebtedness, is an assignment of the equitable lien of the vendor.⁶⁴

It has been held in California⁶⁵ and in Georgia⁶⁶ that the assignment of notes given for the purchase-money of land carries with it the preference of the vendor over the right of homestead of the vendee. But the contrary has been held in Texas, even in a case where it was the intention both of the vendee of the land and of the purchaser of the notes that the assignment of the notes should have this effect.⁶⁷ In California the assignee of the note seems

⁶⁴ The following cases held that it is: *Hadley v. Nash*, 69 N. C. 162; *Blair v. Marsh*, 8 Iowa, 144; *Wells v. Morrow*, 38 Ala. 125; *Miffin v. Camock*, 36 Ala. 695; *Kelly v. Payne*, 18 Ala. 371; *Roper v. McCook*, 7 Ala. 318; *Plowman v. Riddle*, 14 Ala. 169; *White v. Stover*, 10 Ala. 441; *Norvell v. Johnson*, 5 Humph. 489; *Parker v. Kelly*, 10 S. & M. 184; *Tanner v. Hicks*, 4 S. & M. 294; *Rakestraw v. Hamilton*, 14 Iowa, 147; *Kern v. Hazlerigg*, 11 Ind. 443; *Brumfield v. Palmer*, 7 Blackf. 227; *Taylor v. McKenney*, 20 Cal. 618; *Eskridge v. McClure*, 2 Yerg. 84; *Adams v. Cowherd*, 30 Mo. 458; *Davidson v. Allen*, 36 Miss. 419; *Edwards v. Bohannon*, 2 Dana, 98; *Eubank v. Poston*, 5 T. B. Mon. (Ky.) 287; *Kenny v. Collins*, 4 Litt. 290; *Johnson v. Gwathmey*, 4 Litt. 290; *Lagow v. Badollet*, 1 Blackf. 416. *Contra*: *Simpson v. Montgomery*, 25 Ark. 372; *Crawley v. Beggs*, 23 Ark. 563; *Horton v. Horner*, 14 Ohio, 437; *Taylor v. Foote, Wright*, 356; *Brush v. Kinsley*, 14 Ohio, 20; *Jackman v. Hallock*, 1 Ohio, 147; *Claiborne v. Crockett*, 3 Yerg. 27; *Walker v. Williams*, 30 Miss. 165; *Keith v. Horner*, 12 Ill. 524; *Wellborn v. Williams*, 9 Ga. 86; *Lewis v. Corillard*, 21 Cal. 178; *Baum v. Grigsby*, 21 Cal. 172; *Ross v. Heintzen*, 36 Cal. 313; *Iglehart v. Armiger*, 1 Bland Ch. 519; *Skaggs v. Nelson*, 25 Miss. 88; *Shall v. Briscoe*, 8 Ark. 142; *Williams v. Christian*, 18 Ark. 255; *Briggs v. Hill*, 6 How. Miss.) 362.

⁶⁵ *Dillon v. Byrne*, 5 Cal. 455; *Birrell v. Schie*, 9 Cal. 104.

⁶⁶ *Sparger v. Cumpton*, 54 Ga. 355; *Wofford v. Gaines*, 53 Ga. 485. So the assignee of a judgment founded on a note for purchase-money can enforce against the homestead of the judgment debtor. *Chambliss v. Phelps*, 39 Ga. 386.

⁶⁷ *Malone v. Kaufman*, 38 Tex. 454. The transferee of a note given in

to be regarded as occupying precisely the position of the assignor; for it is held that he does not waive this preference by making an additional loan to the purchaser of the property, and cancelling and satisfying of record the old mortgage, and taking a new one, in which the wife of the purchaser did not join, as security for the whole. But, in enforcing such a mortgage, the homestead would be subject only to the extent of the unpaid purchase-money; as to the rest, the mortgagee must look to the other property of the mortgagor;⁶⁸ and a very similar conclusion was reached in Georgia where the assignee of the vendor's privilege was holder of a note payable to the vendor or bearer.⁶⁹

3. Where the vendor took, in payment of the purchase-money, certain notes of a third person, made payable to the vendee, and by the vendee *endorsed* to the vendor, this endorsement was held to be "an obligation contracted for the purchase of said premises," within the meaning of the exception contained in the homestead provisions of the constitution of North Carolina;⁷⁰ but the rule would have been otherwise if the notes had been accepted by the vendor without the vendee's endorsement, in which case the passing of them would have been an absolute payment.⁷¹ And the same rule obtains where a note of a third person secured by a mortgage upon other property, made by such third person, has been endorsed by the vendee to his vendor in payment of the land purchased.⁷²

4. If A lends money to B to enable B to purchase a homestead, or to pay for, or discharge an encumbrance upon, a homestead already purchased, will the right of A to be

purchase of a *chattel* does not occupy the position of a privileged creditor, as against the owner's right of exemption, although the original holder could have been such. *Shepard v. Cross*, 33 Mich. 96; *Harlev v. Davis*, 16 Minn. 487.

⁶⁸ *Dillon v. Bryne*, *supra*. To a similar effect, see *Austin v. Underwood*, 37 Ill. 441. *Contra*: *Phelps v. Conover*, 25 Ill. 314. Compare *Silsbe v. Lucas*, 36 Ill. 462.

⁶⁹ *Wofford v. Gaines*, 53 Ga. 485.

⁷⁰ Const. of North Carolina, 1868, Art. 10, sec. 2.

⁷¹ *Whitaker v. Elliott*, 73 N. C. 186.

⁷² *Lane v. Collier*, 46 Ga. 580.

repaid be superior to the homestead right of B? If B has purchased a homestead with the money of A, under such circumstances as would make him a resulting trustee for A, of course he can assert no right of homestead as against A; since, in the eye of a court of equity, A is the owner of the property, and not B.⁷³ But the question as first put does not suppose such a state of facts as would make B a resulting trustee. The courts have been unable to answer it with any degree of uniformity, and I have been unable, after an attentive examination of the cases, to extract any consistent rule from them.⁷⁴

The reasons given for these opposing conclusions may, perhaps, be best exhibited by quoting from a case in Kansas, and also from one in Pennsylvania. In the former case the court says, referring to the Kansas statute: "The spirit of that provision is that no man shall enjoy property as a homestead, or an improvement thereon, as against the just claim of the person who procured it for him. This is highly equitable and just."⁷⁵ It may be doubted whether this view is not founded in radical error. If courts attempt to extend homestead and exemption laws to cases not necessarily embraced within their terms, in order to do equity and justice, their decisions will, in so far as they proceed in this direction, operate to repeal those laws; for it is in the highest degree equitable and just that a debtor should pay all his debts, and there is neither equity nor justice in allowing him to possess and enjoy property while his debts are unpaid. Homestead and exemption laws have never been

⁷³ *Shepherd v. White*, 11 Tex. 354.

⁷⁴ Under various states of fact the following cases hold that a privilege similar to that of a vendor passes to the person who advances the purchase-money, or the money to complete the payment or discharge the encumbrance—in other words, they call the money so advanced *purchase-money*: *Silsbe v. Lucas*, 36 Ill. 462; *Austin v. Underwood*, 37 Ill. 438; *Allen v. Hawley*, 66 Ill. 164; *Lassen v. Vance*, 8 Cal. 271; *Carr v. Caldwell*, 10 Cal. 385; *Nichols v. Overacker*, 16 Kan. 54; *Pinchain v. Collard*, 13 Tex. 333; *Hamrick v. People's Bank*, 54 Ga. 502. And the following cases hold the contrary: *Notte's Appeal*, 45 Pa. St. 361; *Malone v. Kaufman*, 38 Tex. 454; *Eyster v. Hatheway*, 50 Ill. 521; *Burnap v. Cook*, 16 Iowa, 149.

⁷⁵ *Nichols v. Overacker*, 16 Kan. 59.

supposed to be founded in principles of equity and justice, but are supported by reasons of humanity, expediency, and sound policy, and these reasons have secured for them, on the part of the courts, a liberal interpretation.

The Pennsylvania court, speaking of a similar statute in that state, says: "Whatever the form of the lien, whether legal or equitable, the policy of these statutes is to save it to the owners unimpaired by the legislative benevolence extended to widows and insolvent debtors. But the possessors of such liens are a well-defined class of creditors; they are those who have parted with their lands in consideration of the price agreed to be paid; and to give any part of that price to the widow of the purchaser would be to endow her out of the vendor's property, instead of her husband's. The same thing is done, in effect, it is true, when any property of an insolvent decedent or living debtor is withheld from his creditors; because the property came from, and represents, the credit which has been given him, and, in natural equity, belongs rather to his creditors than to himself. But, whilst the legislature have protected the special class of vendors from the operation of these statutes, they have protected no other class of creditors, but have disregarded all their equities, natural and legal. The distinction rests in nothing but the discretion of the legislature. Regarded as a restriction upon the ordinary remedies for debt, such statutes are constitutional; and, whether the distinction they create between creditors be or be not reasonable and just, it is not to be disregarded in the judicial administration of the statutes." ⁷⁶

The cases which take this view of the question also rest upon a principle frequently ruled—that a third person, advancing money to enable a vendee to buy land, cannot claim a vendor's lien in the land so purchased.⁷⁷

Out of these conflicting decisions the following propositions may, perhaps, be evolved:

(1.) If A advances money to B upon the personal security

⁷⁶ *Notte's Appeal*, 45 Pa. St. 361. Opinion by Woodward, J.

⁷⁷ *Stansell v. Roberts*, 13 Ohio, 148; *Crane v. Caldwell*, 14 Ill. 468; *Skaggs v. Nelson*, 25 Miss. 88. Compare *Jackson v. Austin*, 15 Johns. 477.

of B, and without reference to what B intends to do with it, and B uses it in the purchase of a homestead, or in paying for one previously purchased, the money so advanced will not be regarded as purchase-money, and will not be a privileged debt as against the homestead.⁷⁸ Such a transaction amounts to a mere loan upon the personal security of the borrower, and there is nothing in it which subrogates the lender to the rights of the borrower's vendor. Accordingly, the Pennsylvania case held that a widow was entitled to her exemption, out of the estate of her deceased husband, in preference to a judgment creditor who had loaned money to him to pay for the house and lot of which he died seized. And it was immaterial that the deceased had executed to the person so advancing the money a *judgment bond* which became a lien upon such real estate, in which bond the money so advanced was denominated purchase-money.⁷⁹ It is obvious that this is an extreme case; and, to give it any consistency at all, with the current of decisions in other states upon the same question, it must be assumed that, under the Pennsylvania statute, leaving out of view the question whether the money advanced was, in substance, purchase-money, the homestead right of the widow was paramount to the lien created by the execution of the judgment bond. As we understand it, the case strictly resembles several already quoted, where the husband made a mortgage upon premises purchased with borrowed money, to secure the advance, his wife not joining in the mortgage so as to release the homestead—in all of which cases the mortgage has been held good.⁸⁰ As already seen, the force of the reasoning of the Pennsylvania court is that the courts will not enlarge by implication the definite class of creditors which the legislature has seen fit to save from the operation of the exemption laws. But the turning-point of the case seems to be the fact that there was no *privity* between the vendor and

⁷⁸ *Eyster v. Hatheway*, 50 Ill. 521; *Notte's Appeal*, 45 Pa. St. 361.

⁷⁹ *Notte's Appeal*, *supra*.

⁸⁰ *Lassen v. Vance*, 8 Cal. 271; *Carr v. Caldwell*, 10 Cal. 385; *Nichols v. Overacker*, 16 Kan. 59.

the person advancing the money to the purchaser. In this respect it differs from the Texas case, which takes the same view of the question;⁸¹ for there the notes given to the original vendor were actually bought by the plaintiff.

(2.) But, if A advances money to B for the purpose, and with the intention, of enabling B to purchase a homestead, and the money is not paid directly by A to B, but is paid directly by A to the vendor of B, the money so advanced will be regarded as purchase-money, and the homestead right of B, thus purchased for him by A, will not subsist as against the debt thus created.⁸² Still clearer grounds are afforded for this conclusion if B, at the time the money is so advanced, promises to execute a mortgage to A upon the premises so purchased, to secure the advance, and afterwards refuses to do so.⁸³ In these cases a distinction is taken between a case where money is loaned to pay a *preexisting debt*, created for the purchase of a homestead, and where money is advanced originally for the purchase. But it is obvious that between these two transactions there is no distinction in substance, and there ought to be none in equity. The following case affords a good illustration of the principle just declared: A husband and wife executed a deed of trust upon a quarter-section of land, to secure a note given for borrowed money. The husband held a legal title to one-half of it, and held the other one-half by title-bond, under a contract to purchase, upon which he owed \$400. Being pressed for the payment of this purchase-money, he procured the person from whom he had borrowed the money first stated, and who held the deed of trust covering the whole property, to advance the \$400 to his vendor, and to take a deed from such vendor to secure such advance, giving to him — the first purchaser — a bond for a deed with a clause of forfeiture. This bond was afterwards declared forfeited, and the whole tract was sold under the deed of trust, which contained no release of the homestead right. It was held that the balance of the

⁸¹ *Malone v. Kaufman*, 38 Tex. 454.

⁸² *Austin v. Underwood*, 37 Ill. 438; *Magee v. Magee*, 51 Ill. 500.

⁸³ *Magee v. Magee*, *supra*.

\$400 due for the purchase of one-half of the premises was to be treated as purchase-money due the purchaser at the trustee's sale, and that this purchase-money must be paid before the court would protect the right of homestead claimed.⁸⁴ Even the case of *Magee v. Magee*, where the court attempt to draw this distinction, is an authority for the opposite conclusion; for there the money was, in fact, advanced to discharge a preëxisting indebtedness, which the purchaser was unable to pay.⁸⁵

(3.) The case supposed in the preceding paragraph becomes still stronger where a married man resides upon a tract of land as a tenant, or otherwise, without having title thereto, and, desiring to secure it as his homestead, borrows money of a third person to enable him to effect the purchase of it; and, to secure the money thus advanced, executes a mortgage upon the premises so purchased, his wife, however, not joining in the mortgage deed in such a manner as would release her homestead right, if such a right existed—the loan of the money, the purchase of the premises, and the execution of the mortgage deed being simultaneous transactions. In such a case the mortgage will be paramount to any right of homestead existing in the mortgagor or in his wife. But, as already seen, these cases rest upon the ground that the instantaneous seizin of the husband will not support a right of homestead as against a mortgagee, as it would not have supported a right of dower.⁸⁶

(4.) Notwithstanding the contrary intimation of the Illinois court in *Austin v. Underwood*, and in *Magee v. Magee*, *supra*, it has been held that this principle applies to a case where a third person advances money to discharge a *preëxisting* vendor's lien. In such case the lender will be subrogated to the rights of the vendor, and neither the purchaser nor his wife will be allowed, as against him, to set up a right of homestead in the property thus paid for with his money.⁸⁷ And so, where a homestead had been sold under

⁸⁴ *Allen v. Hawley*, 66 Ill. 164.

⁸⁵ *Magee v. Magee*, 51 Ill. 501.

⁸⁶ *Lassen v. Vance*, 8 Cal. 271; *Nichols v. Overacker*, 16 Kan. 54.

⁸⁷ *Carr v. Caldwell*, 10 Cal. 385.

a decree of court, and, the time for redemption having nearly expired, the debtor procured a third person to pay the redemption money to the purchaser and take an assignment of the certificate of purchase to himself as his security, the debtor also conveying to him another tract as additional security, the money thus advanced was held to be purchase-money.⁸⁸ But this principle has been denied in a case in Texas, even where it was the intention of the vendee and the person advancing the money that the latter should succeed to the vendor's rights.⁸⁹ In the California case the homestead premises were about to be sold under a decree for the purchase-money, whereupon the vendee borrowed, from a third person, money to satisfy the decree, and applied it for that purpose. At the same time, and as a part of the same transaction, he executed a mortgage of the premises to secure the advance, in which mortgage his wife did not join. It was nevertheless held valid, although, by reason of the wife not joining in the deed, it would not have been valid as against a debt not privileged.⁹⁰ But, in the Texas case, the purchaser of a city lot owed \$2,000 therefor, for which he had given his notes to his vendor, and the vendor had assigned these notes to another person, who held possession of the property. The purchaser desired to obtain possession; but the holder of the notes refused to surrender the property unless the notes were first paid. Thereupon the purchaser procured a third person to buy the notes, which being done, the notes were cancelled, and the purchaser executed to such third person new notes for the money so advanced, upon which the holder afterwards brought suit for recovery and to foreclose his supposed vendor's lien. It was held that he had no vendor's lien; that by this transaction he had not been subrogated to the rights of the vendor; although it was admitted, in the opinion of the court, that it was the intention of the parties so to subrogate him. "It is evident," said the court, "that the parties did undertake, by this new contract, to substitute the new contract for the old. They

⁸⁸ *Silsbe v. Lucas*, 36 Ill. 462.

⁸⁹ *Malone v. Kaufman*, 38 Tex. 454.

⁹⁰ *Carr v. Caldwell*, *supra*.

did intend to invest the new contract with the superior force of a vendor's lien; but, still, it is not a contract for purchase-money, which alone could give it that force, and the courts of this state cannot enforce a contract of that kind. The constitution absolutely forbids forced sales of the homestead except for the purchase-money, and the courts are thereby prohibited from making such orders of sale, though the parties, at the time of making the contract, intended it to have the force of a vendor's lien. The vendor's lien is not the creature of contract, but is an incident to a contract for the purchase of land, growing out of that specific kind of contract by operation of law."⁹¹ This case seems not only inconsistent with reason, but more repugnant to natural justice than such cases usually are. The lender not only helped the purchaser to a title, but helped him and his family to possession; and the very possession which he thus purchased for them, under the ruling of the court, converted the property into a homestead and defeated his right to reimbursement. It is easy to say he might have avoided this consequence by taking a mortgage upon the property, but it is equally easy to reply that no man could possibly foresee that an appellate bench would make such a remarkable ruling as this. It is true the debtor committed the mistake of endeavoring to create for himself, by parol, a vendor's lien, under circumstances where, as he might have seen from an earlier decision of the supreme court of the state, it could not be done. In this earlier case it was said that "a vendor's lien upon land is not established by proof that parties agreed that one of them should have a vendor's lien upon certain land. Such a lien arises by operation of law where certain facts exist. If the facts do not exist, the vendor's lien does not arise. Any other kind of lien upon land, such as a mortgage lien, must be evidenced by writing."⁹² But a plain

⁹¹ *Malone v. Kaufman*, 38 Tex. 454, opinion by McAdoo, J.

⁹² *Wynn v. Flannegan*, 25 Tex. 781. In this case the plaintiff sued to enforce a vendor's lien claimed by him upon a tract of 280 acres of land, 200 of which embraced the homestead tract of the husband and wife, defendants in the suit. His evidence of indebtedness consisted of a promissory note reciting

person would certainly assume that the law would operate to raise a vendor's lien, under the circumstances of the case stated. The money paid to procure possession for the debtor was, in substance, as clearly purchase-money as though it had been paid by the vendee himself to his vendor.

(5.) If, in consequence of a transaction wholly disconnected from the payment of the purchase-money, a credit on the unpaid notes taken by the vendor is given by the vendor to the purchaser, and the purchaser gives the corresponding credit to a third person under such circumstances that there is no privity between such third person and the vendor, such third person will not, as against the right of homestead, be subrogated to the rights of the vendor.⁹³

(6.) But if, by an agreement between the vendor and purchaser, the purchase-money is to be paid to a third person, such third person will be deemed to have been subrogated fully to the rights of the vendor, and a homestead exemption cannot be claimed in the land as against him.⁹⁴

Next, as to the *enforcement of the vendor's lien* upon the homestead.

It is said that the lien of a vendor is in the nature of a trust, and that equity regards the vendee as holding

on its face that it was given for the purchase-money of the eighty acres not within the homestead portion of the tract, and a bond to make title to the whole of the tract, executed by the husband and wife to a third party, which was consistent with the contract evidenced by the note. It was held that parol testimony offered by the plaintiff that, by the agreement of the husband, the wife not being a party to it, the plaintiff was to have a lien on the whole of the land, was inadmissible: First, because the effect of such testimony was to vary the terms of the contract as shown by the note and title bond taken together; secondly, because it proposed to establish a lien upon land, not by showing such facts as would give rise to the vendor's lien, but by showing that the parties had agreed that other facts had given the plaintiffs the same rights as if he were indeed the vendor of the whole of the land; and, lastly, because the testimony was inadmissible to affect the homestead rights of the wife unless she had been a party to the agreement.

⁹³ Burnap v. Cook, 16 Iowa, 149. If the reader can possess his mind of the somewhat intricate transaction involved in this case, he will, perhaps, find it a good illustration of the statement made in the text.

⁹⁴ Pinchain v. Collard, 13 Tex. 333; Hamrick v. People's Bank, 54 Ga. 52.

the estate in trust for the payment of the purchase-money, and that he cannot set up any adverse title, or do anything which can place him in a position inconsistent with the interests of the trust, or which has a tendency to interfere with his duty in discharging it.⁹⁵ And, therefore, though by the appropriation by the vendee of the land as a homestead it becomes exempt from execution, it still continues subject to the lien.⁹⁶ But this lien is the mere creature of a court of equity, growing out of the sale and non-payment of the purchase-money, predicated upon the principle that one who has gotten the estate of another ought not, in conscience, to be allowed to keep it and not pay the consideration money.⁹⁷ It is not, strictly speaking, either a *jus in re* or a *jus ad rem*—that is, it is not property in the thing itself, nor does it constitute a right of action for the thing. It more properly constitutes a charge upon the thing.⁹⁸ Being, then, so purely an equitable right, it can only be established by a decree of a court of equity, and enforced in its own peculiar manner and upon its own peculiar principles. It is a relief offered only, then, on the ground that the claimant is remediless in a court of law. If the vendor can, by any proceeding at law, recover the amount due him, chancery never interferes to enable him to assert his equitable lien. His remedy at law must be first exhausted, or it must be shown that none existed there.⁹⁹ It has, therefore, been held that the bare existence of the vendor's lien will not have the effect of removing the homestead exemption and subjecting the property to sale. Hence, where a homestead has been sold under executions at law, and the owner moves to set aside the sale on the ground that the property is exempt, it is no defence to his motion to show that the debts for which the judgments were recovered were for unpaid purchase-

⁹⁵ 1 Story's Eq. Jur., sec. 322.

⁹⁶ Tunstall v. Jones, 25 Ark. 274.

⁹⁷ *Ibid.*

⁹⁸ 1 Story's Eq. Jur., sec. 1215.

⁹⁹ Tunstall v. Jones, 25 Ark. 274; Pratt v. Vanwyck, 6 Gill & J. 498; Eyler v. Crabbs, 2 Md. 154.

money. If the occupancy of the premises as a homestead left the vendor remediless at law, he should have proceeded to foreclose his lien by a bill in equity.¹⁰⁰ So, in those states where legal and equitable remedies are blended, there must be a proceeding in the nature of a suit in equity for the enforcement of the lien, in order to displace the homestead right of the purchaser.¹⁰¹ If the vendor proceeds by suit at law, gets a judgment, and under the judgment causes the property to be sold in disregard of the purchaser's right of homestead, and the purchaser at the sheriff's sale brings ejectment for the premises, it will be a good defence to such suit to show that the premises were occupied as a homestead before the rendition of the judgment, although it be found as a fact that the judgment was rendered for unpaid purchase-money.¹⁰²

But, where homestead premises have been sold under a decree foreclosing a mortgage, the purchaser will be entitled to a writ of assistance to put him in possession, if he can show that the mortgage foreclosed was given for purchase-money; and, if the claim of homestead is first set up by affidavits in opposition to his motion for a writ of assistance,

¹⁰⁰ *Tunstall v. Jones*, 25 Ark. 272.

¹⁰¹ *Pinchain v. Collard*, 13 Tex. 333; *Williams v. Young*, 17 Cal. 403. The reason given in the first case is that the defendant is entitled to notification in the plaintiff's petition of the specific relief sought.

¹⁰² *Williams v. Young*, 17 Cal. 403. *Baldwin, J.*, said, *Field, C. J.*, concurring: "Unquestionably, if this purchase-money constituted a debt which was a lien on the property before the homestead character attached to it, neither the husband nor the wife could hold this property except in subordination to this lien. But the mistake is in supposing that the lien gives any right of entry or title; it is a mere hold or claim to subject the property to sale—the title and right of possession remaining with the debtors until such sale. It is, also, a mistake to suppose that a sale by the sheriff, under judgment at law, for the purchase-money, in the usual form, is an enforcement of this lien. The sheriff merely sells the interest of the defendant in the property when that interest is a leviable estate; but the sale does not pass the equity, which the plaintiff had, to have the land sold to pay the purchase-money, which was a charge upon it. The title which comes from the enforcement of the lien can only enure after proceedings to enforce the lien, and there must be a proceeding in the nature of a chancery suit to settle the sum due, and have the lien declared and a sale decreed."

he may show by counter-affidavits that the mortgage was for purchase-money; and the court will decide the case upon "the whole facts of the record."¹⁰³

But the vendor may also be precluded by his laches from enforcing his lien;¹⁰⁴ and while he may elect to bring simply an action at law for the purchase-money, and such election will not be deemed a waiver of his lien,¹⁰⁵ yet a right of homestead may intervene under such circumstances that the vendor will, after bringing his action at law, be estopped by his laches from changing his action, by amendment, into a suit for the specific enforcement of his lien.¹⁰⁶

But in Iowa the rule that the vendor must proceed by bill in equity to enforce his lien was changed by statute. There the vendor might either sue upon the note or he might bring a separate suit to foreclose the mortgage. If he simply sued upon the note, the property mortgaged might be sold under the execution, and the judgment would be a lien, as between the parties, from the date of recording the mortgage.¹⁰⁷ In either case the purchaser at the sale would take title divested of any homestead right.¹⁰⁸

In Georgia the vendor proceeds to recover judgment for his debt in a suit at law, and, if the purchaser has had set apart to him a homestead in the premises, the vendor, his

¹⁰³ *Skinner v. Beatty*, 16 Cal. 156. This case turned, to some extent, upon the rule of practice which denies to a defendant the right to raise questions of title in opposition to the granting of a writ of assistance (*Montgomery v. Tutt*, 11 Cal. 190). The court said: "If such a pretension as this could defeat a party's right to this writ of assistance, the process would fall into practical disuse, for in every case some suggestion would be made of a title of some sort, in a member of a family or lodger in the house, which would remit the party to his action in ejectment. There is no danger in such a process, for, if improperly issued or executed, the court can, on a summary motion, set aside the writ or the service and restore the possession."

¹⁰⁴ *Rogers v. Green*, 35 Tex. 735.

¹⁰⁵ *McAlpin v. Burnett*, 19 Tex. 497.

¹⁰⁶ *Lawler v. Yeatman*, 37 Tex. 669.

¹⁰⁷ Code of Iowa (ed. 1851), secs. 2086, 2087; Revision of 1860, secs. 3663, 3664. Section 3664 of the Revision of 1860 appears to be omitted from the code of 1873. These provisions were construed in *Redfield v. Hart*, 12 Iowa, 355.

¹⁰⁸ *Christy v. Dyer*, 14 Iowa, 443.

agent, or attorney makes affidavit that the debt on which the execution is founded is one of those excepted by the constitution from the homestead exemption; and then the sheriff must proceed to levy and sell, unless the debtor makes a counter-affidavit—in which case proceedings are stayed and the affidavits are returned into court, and the issue there determined.¹⁰⁹ A counter-affidavit "that to the best of his knowledge and belief he paid the purchase-money for the land levied on" is bad.¹¹⁰

In Mississippi the real estate of a deceased person descends to his heirs at law, and does not pass to his personal representative. Hence a vendor who sues an executor on notes given by his testator for the purchase of real estate is entitled to a general judgment against the executor, to be levied *de bonis testatoris*, but is not entitled also to a special judgment leviable on the land for which the notes were given. To obtain this he must proceed against the heirs.¹¹¹

Suppose a portion of the purchase-money due for the homestead has been paid, and the vendor seeks to foreclose his lien for the balance, does this payment disencumber the homestead *pro tanto*, or does the entire homestead remain liable to sale as long as any of the purchase-money remains unpaid? Is the doctrine of *apportionment* applicable to such a case? This question has been answered in the negative.¹¹² "The whole land sold," say the Georgia court, "especially if it be in one body, and for a specific price, and bond for title be given, is bound for the payment of the purchase-money, and the purchaser, on account of a partial payment, has no right to claim a homestead in the land to that

¹⁰⁹ Georgia Code of 1873, secs. 2028-2031.

¹¹⁰ McGhee v. Way, 46 Ga. 282.

¹¹¹ Buckingham v. Nelson, 42 Miss. 417. The recital of the statute (Revised Code of 1857, Art. 284, p. 530), that "*no property* is exempt when the purchase-money forms, in whole or in part, the debt on which the judgment is founded," does not alter the case. *Ibid.*

¹¹² Cook v. Crocker, 53 Ga. 66; Harris v. Glenn, 56 Ga. 94, citing Sale v. Wingfield, MS., decided by the same court at the same term. Weider v. Clark, 27 Ill. 251; Bush v. Scott, 76 Ill. 525.

extent, or in the proportion which the payment bears to the whole purchase-money. Nor does the fact that the purchaser has made improvements on the land, and that it has depreciated in value below the amount of the unpaid balance, affect the question. The vendor does not warrant against depreciation. The purchaser risks that. If the land advances in value, it is his gain; if it declines, he suffers the loss."¹¹³

Where several parcels of land were included in one purchase, and a mortgage given on one of the tracts for a part of the purchase-money, and, on sale under foreclosure, it did not satisfy the debt, and a decree was taken for the balance, under which another of the tracts was taken on execution, it was held that there was no homestead right in this tract as against the purchase-money due on the entire purchase.¹¹⁴ In another case, in the same state, one M. owned a tract of land which he had mortgaged to one C. for \$1,400. W. wished to buy this tract from M. for \$2,000, and another tract from C. for \$1,600. It was arranged that M. should convey his tract to C. for the \$3,000, less the mortgage, and that C. should then convey both tracts to W. for \$4,600, W. to pay \$1,000 down and give a mortgage for the balance. The court held that this was a sale of the whole premises from C. to W., and that, the mortgage being given for a part of the purchase-money, W. could not claim a homestead in the M. tract to defeat a foreclosure.¹¹⁵

But, where exempt property which has been set apart to

¹¹³ *Cook v. Crocker*, 53 Ga. 66. In Texas, under a decree of the district court, an entire tract of land was sold for the payment of an unpaid balance of purchase-money, but previous to the rendition of the decree the vendee had died, and the probate court had set aside to his family a portion of the tract as their homestead. It was held that this homestead claim could avail nothing against the title of the purchaser under the decree of the district court, which decree could not be collaterally impeached on the ground that a sale of a part only of the tract would have sufficed to satisfy the unpaid purchase-money, leaving unsold the portion claimed as the homestead. *McCreery v. Fortson*, 35 Tex. 641.

¹¹⁴ *Bush v. Scott*, 76 Ill. 525.

¹¹⁵ *Weider v. Clark*, 27 Ill. 251.

a debtor consists of *several articles* capable of separation, and the purchase-money of one of these articles has not been paid, this article will be held liable for the purchase-money, but the rest of the property will be held exempt."¹⁶ So, where a judgment has been obtained for the purchase-money of land, and the land has been sold to satisfy the same, but does not fully discharge the debt, the judgment is not such a lien on the crop which has matured and been gathered on the land, before the levy of the execution on the land, as would defeat the right of the vendee to hold the crop as an exemption."¹⁷

In New York a different rule has obtained, under an act of the legislature which exempted from execution certain chattels in addition to those exempted by the Revised Statutes, and which provided "that such exemption shall not extend to any execution issued on a demand for the purchase-money of such furniture or tools, or team, or articles now

¹¹⁶ *Loyless v. Collins*, 55 Ga. 370. One of the five judges (Jackson, J.) dissented in a strong opinion. The specific article in this case held liable for the purchase-money was a cotton-gin. He thought it would be a great wrong to allow the debtor to wear out or consume an exempt article which had not been paid for, and to hold as exempt against the seller the balance of his homestead. He thought that a fair interpretation of those provisions of the constitution and laws of Georgia, relating to this subject, made *all* the homestead and exemption liable for the purchase-money of *any part*. "Neither the constitution, nor any act passed to carry it into effect," said he, "cuts up the homestead and exemption into separate parcels, making one parcel liable for one debt and another for another debt; but they both treat the whole as *one trust estate*, exempt from all liabilities of the head of the family, except a particular class of debts, and for this class of debts I think the whole trust estate is liable."

¹¹⁷ *Johnson v. Holmes*, 49 Ga. 365. The court said: "The lien of a judgment for the purchase-money of land, where bond for title only is given, is by statute superior to all other liens. But it does not go beyond the land sold, as to its having any other priority over other judgments. If the execution issued thereon were levied on crops produced on the land by the defendant, and which had matured and been gathered, older executions would take in preference. Even if the defendant had produced many crops, and with them had purchased other property, the lien of the older judgments on that property would be superior to the vendor's judgment. Outside of the specific lien given to it by statute, we know of no other priority it has, either in law or equity."

enumerated by law."¹¹⁸ In construing this proviso the courts of that state have see-sawed back and forth in a manner which produces the greatest confusion, and deprives their judgments of much claim to respect. The better conclusion seems to be that, under it, all the articles specified in this statute are liable to seizure and sale on an execution to collect the purchase-money of any one of them, or of any other property which was, under the revised statutes, exempt from execution;¹¹⁹ but no article exempt by the revised statutes can be levied on to collect the purchase price of any exempted article whatever—¹²⁰ an incongruous result, to say the least.

But, where a mortgage covered two tracts, one of which was the homestead of the mortgagor, and a part of the debt secured by the mortgage was purchase-money of the homestead, and the rest a loan, it was held that the mortgagee, in foreclosing, was entitled to make out of the lot claimed as a homestead only the actual amount of the interest and purchase-money remaining due, and that for the excess over the purchase-money he must proceed on his other security, or against the party personally.¹²¹ In this case the plaintiff sold the defendant the homestead lot, and took a mortgage upon it for the purchase-money. Afterwards he loaned the defendant another sum, and took a new mortgage, covering the homestead lot and another lot, as his security, and cancelled the old mortgage of record. The second mortgage; so far as it embraced the amount covered by the first mortgage, was held to be for purchase-money; and then the court ruled as stated. There is no suggestion that the second mortgage was not, in so far as it was a security for the loan, a valid

¹¹⁸ New York Acts of 1842, p. 193, sec. 1.

¹¹⁹ Mathewson v. Weller, 3 Denio, 52; Snyder v. Davis, 1 Hun, 350; Craft v. Curtiss, 25 How. Pr. 163; Cox v. Stafford, 14 How. Pr. 519; Cole v. Stevens, 9 Barb. 676; Davis v. Peabody, 10 Barb. 91. *Contra*: Hickox v. Fay, 36 Barb. 9; Smith v. Slade, 57 Barb. 637.

¹²⁰ Cox v. Stafford, *supra*. "You may levy such an execution on a *team horse* [exempt by the act of 1842], but not on a *cow* or a *stove*" [exempt by the Revised Statutes]. Davis v. Peabody, *supra*.

¹²¹ Dillon v. Byrne, 5 Cal. 455, Murray, C. J., and Heydenfeldt, J.

mortgage of the homestead. One can easily understand why a court of equity would, in view of the policy of the homestead laws, exercise its power so as to compel the mortgagee to exhaust the non-homestead property first,¹²² but it could not properly exercise them so as to deprive the mortgagee of the means of collecting his debt until all his security, including the homestead, was exhausted; for this would destroy a vested right.¹²³ In part, then, *Dillon v. Byrne* is clearly erroneous, and ought not to be followed.

Where a husband and wife executed a mortgage for the purchase-money of a homestead, and also to secure other indebtedness not privileged as against the homestead, and afterwards a portion of the mortgage debt was paid and the mortgage surrendered, and a new mortgage for the balance executed *by the husband alone*, it was held that the mortgagee could enforce his lien against the homestead for so much of the indebtedness as consisted of purchase-money and interest thereon, but not for the balance.¹²⁴ In such a case, under the Kansas practice, the proper form of the judgment to be entered is said to be a personal judgment against the mortgagee for the full amount of the note, with interest, and a finding as to what amount constitutes purchase-money, with the interest thereon, and then a decree that such amount is a lien upon the homestead premises.¹²⁵

Let us next consider some of the *consequences* which flow from this privilege over the homestead exemption accorded to debts due for unpaid purchase-money.

It follows that a mortgage of the homestead by the husband, the wife not joining therein, which, because of the non-concurrence of the wife, would be ineffectual to waive the homestead right in favor of an ordinary debt, is a good mortgage where the debt secured is unpaid purchase-money.

¹²² *McLaughlin v. Hart*, 46 Cal. 638; *Twogood v. Stephens*, 19 Iowa, 405; *Barker v. Rollins*, 30 Iowa, 412; Iowa Revision of 1860, sec. 2281; *Pittman's Appeal*, 48 Pa. St. 315. *Contra*: *White v. Polleys*, 20 Wis. 503; *Searle v. Chapman*, 121 Mass. 19.

¹²³ *Kelly v. Dill*, 23 Minn. 435.

¹²⁴ *Pratt v. Topeka Bank*, 12 Kan. 570.

¹²⁵ *Ibid.*

since, as to a debt of this kind, *there is no homestead exemption*.¹²⁶ Besides, it is said that such a mortgage must of necessity have priority over the homestead claim, for the reason that such a claim "could not be made until *after* the purchase was effected,"¹²⁷ and, if executed *subsequently* to the declaration of homestead, it would be held by any court in which it might be foreclosed, upon the plainest principles of equity, to have priority over the homestead claim, unless the court was prepared to hold that the act was a legislative device to enable purchasers to swindle vendors."¹²⁸

The converse seems also true. If the wife purchases property in her own name, and executes a mortgage for the purchase-money without her husband joining, it will be a good mortgage.¹²⁹ And where a married woman, having a separate estate, executed a mortgage thereon to secure the payment of the sum of \$8,000 loaned to her, and made an affidavit on the back of the mortgage that the money was to be used for the payment of the purchase-money due for the property, and it appeared that the money was loaned on the faith of that sworn statement, it was held that she was *estopped* from controverting the facts stated in her affidavit on an application for homestead exemption, under the Georgia homestead act of 1868, as against the mortgagee. "To allow her to claim a homestead exemption under the seventh section of the act, as against the mortgagee, would be, to speak in the mildest terms, a legal fraud."¹³⁰

It results, from the foregoing, the wife cannot interfere with the husband in arranging for the payment of the purchase-

¹²⁶ Nichols v. Overacker, 16 Kan. 59; Dillon v. Byrne, 5 Cal. 455; Carr v. Caldwell, 10 Cal. 385; Peterson v. Hornblower, 33 Cal. 275; Hopper v. Parkinson, 5 Nev. 233; Amphlett v. Hibbard, 29 Mich. 298; Barnes v. Gay, 7 Iowa, 26; Christy v. Dyer, 14 Iowa, 438, and other cases.

¹²⁷ *Dictum* of Rhodes, J., in Peterson v. Hornblower, 33 Cal. 275; so held in Hopper v. Parkinson, 5 Nev. 233, 238. Compare Christy v. Dyer, 14 Iowa, 441; Thurston v. Maddocks, 6 Allen, 427.

¹²⁸ Rhodes, J., in Peterson v. Hornblower, 33 Cal. 275; quoted with approbation in Hopper v. Parkinson, 5 Nev. 238.

¹²⁹ Andrews v. Alcorn, 13 Kan. 359.

¹³⁰ Lathrop v. Soldiers' Loan and Building Association, 45 Ga. 483, Warner, C. J.

money; and it has been said that he can, if he sees proper to do so, renounce and surrender the land, unless his conduct is tainted by fraud.¹³¹ Or, he may buy in an *outstanding title* to the homestead premises on credit, and the consideration agreed to be paid for it will be privileged against the homestead as purchase-money. "The design of the framers of the homestead law," say the court, "manifestly was to secure a home to the wife and children of the debtor. It was for their protection more than his. But, the title being usually vested in the husband, he must be treated as acting, at least to some extent, as their trustee for the protection of this right which has been cast by the law upon the wife and children; and, by virtue of his relation to their rights, he is necessarily vested with the power to perform all acts necessary to secure the title, and thus effectuate the design of the statute. He is, therefore, authorized, when necessary, to purchase an outstanding title for the purpose of securing the enjoyment of the right; and, when he has made such a purchase, it will be presumed to have been necessary; but this presumption may be rebutted by the wife, upon showing that she or her husband owned the paramount title when the outstanding title was acquired. If the wife shall show that the real title was so held at the time the outstanding title was obtained, then the consideration agreed to be paid will not be regarded as purchase-money, so as to subject the land to its payment. On the contrary, if the

¹³¹ *Burford v. Rosenfield*, 37 Tex. 46. What *fraud* the court mean by the above expression, the obscure opinion does not make clear. "So long as the property in controversy remained the homestead of the family, it could not be sold without consent of the wife, except for the payment of the purchase-money." *Walker, J., in Morrill v. Hopkins*, 36 Tex. 686. In the same state it has been held that an administrator who, without an order of the court, discharges a vendor's lien on property set apart to the children of the deceased as a homestead, must account for the money thus advanced; first, because it could not be seen that such an advance was "beneficial to the estate." within the meaning of section 5706 of Paschal's Digest of Laws; and, second, because he acted without authority of the court. But the question whether a fund belonging to general creditors could, in a proper proceeding, be diminished in order to discharge such a lien, was held not presented by the case. *Mullins v. Yarborough*, 44 Tex. 14.

wife fail to show that the paramount title was already held, then it must be considered that the money agreed to be paid for the subsequently-acquired title is purchase-money within the statute. The husband being the head of the family, the presumption is that he acts for their benefit when he acquires or perfects a title to the homestead. When already in possession under a defective title, he may, with or without the consent of the wife, acquire an outstanding title on credit; and the husband cannot, but the wife may, deny that it was paramount. And, until it appears that such a title was not acquired, the consideration agreed to be paid will be treated as purchase-money."¹³²

It also results that, when the property purchased has acquired this character, it is not competent for the purchaser, without consent of his wife, to create an additional charge upon the land in favor of the vendor, as by agreeing to pay interest in addition to the purchase-money.¹³³

VI. *Liens for the Creation, Improvement, and Preservation of the Property—Mechanic's, Furnisher's, and Landlord's Liens.*

Under various homestead and exemption laws, debts contracted in creating, improving, or preserving homestead or other exempt property, as where the demand is upon a mechanic's, laborer's, or furnisher's lien for work done or materials furnished, are privileged.¹³⁴ The benevolent policy

¹³² Cassell v. Ross, 33 Ill. 257.

¹³³ McHendry v. Reilly, 13 Cal. 75.

¹³⁴ Alabama—As to homestead and personal property exemptions, Code 1876, sec. 2822. Arizona—As to homestead, Compiled Laws 1871, ch. 37, sec. 2. Arkansas—As to homestead, Stat. 1874, ch. 56, sec. 2625. California—*Ibid.*, Civil Code, p. 339, sec. 1241. Dakota—*Ibid.*, Rev. Code 1877, p. 183, sec. 4. Georgia—*Ibid.*, and also for money borrowed and expended in the improvement of the homestead, Code 1873, sec. 2002. Illinois—As to homestead and personal property exemptions, Rev. Stat. 1877, ch. 52, sec. 3. Indiana—*Ibid.*, Stat. 1876, vol. 2, ch. 11, sec. 4. Iowa—As to homestead, Code 1873, sec. 1991. Kansas—*Ibid.*, Gen. Stat. 1868, ch. 38, sec. 1; Const., Art. 15, sec. 9. Maine—*Ibid.*, Rev. Stat. 1871, ch. 81, sec. 63. Minnesota—*Ibid.*, Bissell Stat. at Large, ch. 32, title 5, sec. 166. Mississippi—As to homestead and personal property exemptions, Rev. Code 1871, sec. 2142. Montana—As to homestead, Laws 1872, p. 84, sec. 262. New Hampshire—*Ibid.*, Gen. Stat. 1867, ch. 124, sec. 18. Nevada—*Ibid.*, Compiled Laws 1873, vol. 1, p. 61, sec. 187. North Carolina—As to homestead

which has manifested itself in the enacting of laws exempting from execution in the hands of poor debtors certain necessary articles of personal property has excepted from the operation of such laws debts due for the hire of clerks, mechanics, laborers, and servants.¹³⁵ Leaving out of view this privilege accorded to laborers in favor of their wages, it is obvious that the former class of liens is essentially the same as liens for purchase-money, and ought to be governed by the same principles. There is no difference whatever, in substance, between a debt due to A, who has provided me with the land on which I have erected my dwelling, and a debt due to B, who has furnished the materials to build it, and a debt due to C, whose labor has built it. If, then, the courts, on general principles of equity, are prepared to say that they will not permit me to enjoy a homestead exemption, as against A, until I have paid him for the property,¹³⁶ they ought, upon the same principles, to say that I shall not be permitted to hold my dwelling exempt, as against B and C, until I have paid them for erecting it.

and personal property exemptions, Battle's Revision 1873, ch. 55, sec. 1. South Carolina—*Ibid.*, Const. 1868, Art. 2, sec. 32. Tennessee—As to homestead, Stat. 1871, vol. 1, sec. 2114 *a*. Texas—As to homestead, Const. Art. 12, sec. 16. Vermont—*Ibid.*, Gen. Stat. 1862 (App. 1870), ch. 68, sec. 18. Virginia—As to homestead and personal property exemptions, Code 1873, ch. 183, sec. 1. Wisconsin—As to homestead, Rev. Stat. 1871, vol. 2, p. 1549, sec. 24.

¹³⁵ Arkansas—As to homestead; "for labor performed for the owner thereof," Stat. 1874, ch. 56, sec. 2625. Illinois—As to personal property "when the debt or judgment is for the wages of any laborer or servant," Rev. Stat. 1877, ch. 52, sec. 16. Kansas—*Ibid.*, "for the wages of any clerk, mechanic, laborer, or servant," Gen. Stat. 1868, ch. 38, sec. 6. Nebraska—As to homestead and personal property, Gen. Stat. 1873, ch. 57, sec. 522. New York—As to personal property; "for wages of domestic," Edmond's Stat. at Large, vol. 4 (2d ed.), p. 635. West Virginia—As to personal property; "labor performed in a family as a domestic," Code 1868, ch. 41, sec. 28. Dakota—As to personal property; claim "for laborers or mechanics' wages," Rev. Code 1877, p. 570, sec. 332.

¹³⁶ Farmer v. Simpson, 6 Tex. 303; Stone v. Darnell, 20 Tex. 14; Shepherd v. White, 11 Tex. 54; Barnes v. Gay, 7 Iowa, 26; Christy v. Dyer, 14 Iowa, 438; Burnap v. Cook, 16 Iowa, 149; Cole v. Gill, 14 Iowa, 527; Skinner v. Beatty, 16 Cal. 156.

But this question was presented in Minnesota, in the absence of a statute creating, as against the homestead exemption, any reservation in favor of mechanics and material-men; and the court held otherwise, on the ground that "the purchase of materials to be used in the erection or repairing of a house, on land occupied as a homestead, cannot be considered as a waiver of the homestead right secured by the statute;" nor was the debt due the mechanic a part of the purchase-money of the homestead property; "it is no more a part of the purchase-money than the price of a fruit-tree or fence-post used in the improvement of the property would be."¹³⁷

Soon after the decision of the former case the legislature of Minnesota passed an amendment to their homestead exemption act, reading as follows: "Such exemption shall not extend to any contract for a lien, or upon which a lien would arise under the lien laws of this state, for work done and material furnished in the erection or repair of a dwelling-house, or other building, on said land."¹³⁸ Nothing, it should seem, could be wanting to make plain the meaning of this statute. The purpose of the legislature undoubtedly was to repeal the rule declared by the supreme court in *Cogel v. Mickow*, and to provide that, in a case where a mechanic or material-man would otherwise, under existing laws, be entitled to a lien, he should not be deprived of it under the plea of homestead exemption. And, as it is in the highest degree iniquitous that a man who has built the house of another, or furnished materials to build it, should be denied payment therefor, while the debtor is permitted to retain and enjoy the specific article which his labor or money has created, it is difficult to understand upon what ground a court could refuse to give effect to such a statute. But the supreme court of Minnesota did refuse to give effect to it, upon the novel ground that, in the particular case, there had been no *express contract* for a lien; that a mechanic's lien is

¹³⁷ *Cogel v. Mickow*, 11 Minn. 478; *Smith v. Lackor*, 23 Minn. 454.

¹³⁸ Minnesota Laws 1869, ch. 26.

a creature of statute merely; that a mere contract for the purchase of certain materials to be used in the erection of a building is not "a contract for a lien," within the meaning of the statute, nor one "under which a lien would arise under the laws of this state;" and that, if the law were susceptible of the contrary construction, it would be unconstitutional!¹³⁹

But, if the property on which the building was erected was not a homestead at the time when the lien of the mechanic or material-man attached, the fact that it became such after the lien attached would not deprive the claimant of his lien.¹⁴⁰

In those states where the statutes forbid the alienation or encumbering of the homestead, except with the consent of the wife, expressed by deed formally acknowledged, it would seem to be a reasonable conclusion that the husband cannot charge it with the costs of improvements without the consent of the wife expressed with equal formality. It seems a sound view that what a statute prohibits a man from doing directly, the courts will not, by construction, permit him to do indirectly; and if the husband could, without the consent of the wife, charge the family homestead for improvements, an improvident husband could easily make this right the means of alienating it altogether. "Improvements, worthless to the family, might become an assurance of title as effectual as a deed properly executed and acknowledged; or their very poverty, the strongest reason why the family should be secured the small pittance allowed them by law, might occasion its loss; or the husband, by whose wrongful connivance the occupant had entered, might withhold the means of compensating for them, and thus give effect to his original wrong."¹⁴¹ In accordance with this view, where the husband, without the consent of the wife, entered into a contract for the sale of a portion of their homestead premises, and put the purchaser into possession thereunder, and the purchaser made valuable improvements thereon, and the husband

¹³⁹ Coleman v. Ballandi, 22 Minn. 144.

¹⁴⁰ Tuttle v. Howe, 14 Minn. 145.

¹⁴¹ Eckhardt v. Schlecht, 29 Tex. 129, 134.

brought an action and recovered judgment for the premises on the ground that they were a part of the homestead, the court at the same time giving judgment in favor of the purchaser on a plea in reconvention for the value of the improvements, it was held error to withhold a writ of possession until such judgment should be paid.¹⁴² So in Iowa the fact that a judgment was for work and materials upon the homestead of the defendant would not make it liable to sale therefor, except as for a mechanic's lien, enforced as such in the manner provided by statute.¹⁴³

What is an "*improvement*" within the meaning of statutes of this description? Something, it seems, having the character of a *fixture*. Under a constitutional provision creating a homestead exemption, but excepting from its operation "obligations contracted for the erection of improvements thereon,"¹⁴⁴ it was held that a debt contracted for a portable engine, purchased by two partners and used on the land claimed as exempt, to supply motive power for a cotton-gin—one of the partners having no interest in the land, and the other being a tenant in common thereof with his sister—was not privileged, because the engine was not a part of the freehold, but personalty, and subject to the partnership debts. Nothing, it seems, can be deemed an improvement, within the meaning of such a provision, that is not attached to the freehold as a fixture.¹⁴⁵

Under a statute in Georgia,¹⁴⁶ "*factors, merchants, landlords, dealers in fertilizers, and all other persons furnishing supplies, money, farming utensils, or other articles of necessity to make crops,*" have the right, by written contract, "to secure themselves upon the crops of the year in which such things are done or furnished." The liens thus created are declared to be superior in rank to *all other liens*, except liens for taxes, the general and special liens of laborers, and the

¹⁴² *Ibid.*

¹⁴³ *Delavan v. Pratt*, 19 Iowa, 429, 432.

¹⁴⁴ Const. of Arkansas, 1868, Art. 12, sec. 3.

¹⁴⁵ *Greenwood v. Maddox*, 27 Ark. 660.

¹⁴⁶ Rev. Code of 1873, sec. 1978.

special liens of landlords, to which they shall be inferior." Recollecting that the doctrine of the supreme court of Georgia is that the homestead—in which term the personal property exemption is, in that state, loosely included—is in the nature of an encumbrance upon the estate, and we are prepared for the conclusion that the "factor's lien" created by this statute takes precedence of any exemption to which the family may be entitled under the exemption law. The Georgia court, however, place this conclusion upon the more refined ground that supplies furnished by a factor or merchant to a planter, to enable him to make a crop, are in the nature of "materials furnished therefor," which constitutes one of the exceptions named in that section of the constitution of Georgia¹⁴⁷ which guarantees a homestead exemption; or, in the nature of purchase-money—another exception.¹⁴⁸

In Georgia a *landlord's lien* for rent is superior to any exemption which may be claimed by the tenant or his wife out of the crop grown on the demised premises, or out of its proceeds when sold.¹⁴⁹ The reason given for this rule is that "neither the crop nor the money for which it is sold is legally or equitably the property of the tenant until the rent is paid," and because "the landlord may follow either till his claim is satisfied."¹⁵⁰ "It would be manifestly unjust, and violative of the rules of law, to permit parties to use the

¹⁴⁷ Const. of Georgia, 1868, Art. 7, sec. 1; Georgia Code of 1873, p. 925, sec. 5135.

¹⁴⁸ *Tift v. Newsom*, 44 Ga. 600. "A homestead of realty," said Montgomery, J., "is certainly liable for 'money borrowed and expended in the improvement of the homestead,' and 'for labor done thereon,' and 'material furnished therefor,' and 'for the purchase-money of the same.' Upon what better foundation does the exemption of personalty rest? None is perceived. If none exists, it follows that it must be liable for the 'material furnished therefor.' And, certainly, provisions furnished to make the crop may be well considered as of this last-mentioned class. The money expended in the purchase of such provisions not only vests the title to the crop in the planter, but actually creates the crop. It may at least be said to be in the nature of purchase-money."

¹⁴⁹ *Davis v. Meyers*, 41 Ga. 95; *Taliaferro v. Pry*, 41 Ga. 622; *Harrell v. Fagan*, 43 Ga. 339,

¹⁵⁰ *Davis v. Meyers*, *supra*, Brown, C. J.

property of another under a contract for rent, and then claim the proceeds, in kind or in cash, otherwise invested, without settling with the landlord for the use and occupancy of his property." ¹⁵¹ The rent is said to be in the nature of the *purchase-money* of the crop, and, therefore, included in the exception of the constitution. ¹⁵²

A statute of Georgia provides that "all produce, rents, or profits, arising from homesteads in this state, shall be for the support and education of the families claiming said homesteads, and said produce, rents, or profits as aforesaid shall be exempt from levy and sale, except as is provided for in the constitution, and except for stock, provisions, and other articles used in making the crop, *necessaries for the family*, medical services, and tuition for education." ¹⁵³ It has been held by the supreme court of that state that the rent of a house and lot wholly disconnected from the homestead is not one of the exceptions mentioned in this act, for which the produce, rents, and profits of the homestead is liable. The term "necessaries," as there used, refers to such as have been furnished to the family in connection with the enjoyment of the homestead property, such as were necessary for them in the cultivation of the crops raised thereon, and for the support of the family whilst cultivating such crops. ¹⁵⁴

VII. *Judgments in Actions Ex Delicto.*

Some of the homestead and exemption laws expressly limit their protection to cases where the cause of action springs out of a contract. ¹⁵⁵ In defining the nature of the demands against which the exemption created is to operate,

¹⁵¹ Talliaferro v. Pry, *supra*, Lochrane, C. J.

¹⁵² Harrell v. Fagan, 43 Ga. 339; Const. of Georgia, Art. 7, sec. 1; Code of Georgia, 1873, secs. 5135, 2002.

¹⁵³ Georgia Acts of 1869, p. 24; Georgia Code of 1873, sec. 2006.

¹⁵⁴ Huff v. Bournell, 48 Ga. 338.

¹⁵⁵ The Pennsylvania act of 1849 contained such a provision, and it was held that this repealed prior statutes. Kenyon v. Gould, 61 Pa. St. 292; Lane v. Baker, 2 Grant Cas. 424; Edwards v. Mahon, 5 Phila. Rep. 531. In that state a constable is not entitled to the benefit of the exemption laws on an execution issued against him on a judgment in an action on his official bond for a violation of official duty. Kirkpatrick v. White, 29 Pa. St. 176.

statutes frequently use such expressions as "debts contracted,"¹⁵⁶ or "any debt contracted," or "any debt or liability contracted," after a date named. Moreover, some of these laws expressly except from their operation demands for torts committed for which damages are recoverable, or for *costs* awarded in such actions.¹⁵⁷

A statute the benefits of which were limited to "any debt growing out of, or founded upon, a contract, express or implied,"¹⁵⁸ did not, of course, protect the property of a defendant against whom a judgment was had in an action for slander.¹⁵⁹ But an action on an implied contract for use and occupation of land¹⁶⁰ sounded in contract, and not in tort, and was, therefore, within the class of actions in which, under this statute, the exemption was allowed.¹⁶¹

But it was held in Illinois that a homestead could not be sold under execution issued on a judgment for slander, although it was admitted by the court that such a case did not fall within the exact terms of their homestead act. That statute¹⁶² limited the exemption to "debts contracted" from and after a given date. But subsequently an amendatory act was passed, relating to conveyances of the homestead, which recited that it was "the intent and object of this act to require, in all cases, the signature and acknowledgment of the wife as conditions to the alienation of the

¹⁵⁶ Illinois Statutes of February 11, 1851.

¹⁵⁷ Delaware—Personal property not exempt "upon execution or judgment recovered in any action of trespass *vi et armis*," Rev. Code 1852, ch. 111, sec. 2. Nebraska—"For money due and owing by any attorney at law, for money or other valuable consideration received by said attorney for any person or persons," Gen. Stat. 1873, ch. 57, sec. 531. Vermont—"For damages and costs recovered for neglect of owner to build division fence between the homestead and adjoining property," Gen. Stat. 1862 (App. 1870), ch. 68, title 22, p. 456. Virginia—"For liabilities incurred by any public officer, or officer of a court, or any fiduciary, or any attorney at law, for money collected.

¹⁵⁸ Rev. Stat. Indiana (ed. 1852), p. 337.

¹⁵⁹ State v. Melogue, 9 Ind. 196.

¹⁶⁰ Crane v. Waggoner, 27 Ind. 52.

¹⁶¹ *Ibid.*, 33 Ind. 83, 85.

¹⁶² Act of February 11, 1851; Illinois Statutes (ed 1858), p. 576, sec. 1.

homestead." It was by construing these two statutes together that the court reached this conclusion—a conclusion which, though humane, and possibly beneficial to society, must stand as a naked piece of judicial legislation.¹⁶³

But where the protection of the statute was extended to "any debt or *liability* contracted" after a given date,¹⁶⁴ this was held to include a judgment for damages for an assault and battery committed after the prescribed date; for the word "liability," used in conjunction with the word "debt," was broad enough to include all claims, whether founded upon tort or contract.¹⁶⁵

The constitution of North Carolina, adopted in 1868, created an exemption of personal property and of a homestead "from sale under execution or other final process of any court issued for the collection of any *debt*."¹⁶⁶ This, it was held, protected a homestead from forced sale where the judgment was recovered in an action for slander.¹⁶⁷

¹⁶³ Conroy v. Sullivan, 44 Ill. 451. "The judgment," said Lawrence, J., "in this case was not strictly a debt contracted. But the law of 1857 declared it to be the object of the legislature to prevent the alienation of the homestead in any case except by the consent of the wife. In the light of both these laws this court has constantly held that it was the evident intent of the legislature to protect the homestead as a shelter for the wife and children, independently of any acts of the husband. He cannot deprive them of their right to it without the consent of the wife, either by his contracts or his torts. There is no more reason, so far as the wife is concerned, for permitting it to be sold for the husband's tort than for his violation of a contract, and it is the evident policy of the law to forbid its being sold under a judgment and execution in either case."

¹⁶⁴ Rev. Stat. of Wisconsin (ed. 1858), p. 785, sec. 23.

¹⁶⁵ Smith v. Omans, 17 Wis. 395.

¹⁶⁶ Const. of North Carolina, 1868, Art. 10, secs. 1, 2.

¹⁶⁷ Dellinger v. Tweed, 66 N. C. 206. This judgment was concurred in by Reade, Dick, and Boyden, JJ.; Pearson, C. J., and Rodman, J., dissenting. Reade, J., in delivering the opinion of the court, said: "Against this view it is objected that the words used are 'any debt,' and that a debt is necessarily founded on a contract. And, therefore, while the homestead cannot be sold under execution at all, yet it may be sold under an execution obtained on a tort or on damages. To this it is answered that, if the language of the constitution is to be understood in the technical sense of the term used, then there is no homestead exemption at all; for it was never known that an execution issued or was obtained upon a debt, or upon a contract, or upon a

Does the term "*debt contracted*" include a debt contracted through *fraud*? In New York, under a statute exempting property "from sale on execution for debts hereafter contracted," it seems to have been ruled that a debtor's homestead would be protected, although he had obtained credit in the particular case by fraudulently representing that the house was subject to sale on execution.¹⁶⁸ But three of the judges thought that the statute did not protect property against an execution on a judgment obtained for a fraud. But, in any event, where the owner of a house had filed and recorded a notice that he claimed the same as his homestead, and afterwards obtained credit by representing that, except a small mortgage, there was no "claim or encumbrance" thereon, this was not a false representation. It was said that a homestead exemption did not constitute a claim or encumbrance on the land; since, "after the exemption was created, the defendant had the same title to, and interest in, the land, and the same power to dispose of it as before, and no other person acquired any rights thereby—" ¹⁶⁹ a very

tort, or upon damages. An execution in all cases issues or is obtained upon a judgment. So that, instead of reading the constitution as it is, 'shall be exempted from sale under execution or other final process obtained on any debt,' we must read it, as it must necessarily mean, to make sense, 'shall be exempted from execution obtained on any judgment,' or else we must hold a judgment to mean a debt, as clearly it does. And then the manifest intention will be carried out—that the homestead shall not be sold on execution at all, except in the cases named in the constitution. But, then, it is asked, if the constitution means judgment, instead of debt, why did it not say so? It may just as well be asked, if it meant contract, why did it not say so? It does say plainly enough, and expressly, that it shall not be sold under execution, and that was the main idea to which the convention was advertent, and it was inadvertent in describing upon what the execution was to issue, as well it might be, because an execution cannot issue except upon a judgment. We admit that a plausible argument against this view is founded upon the impolicy of allowing a man to commit torts with impunity. But we think a still more plausible argument might be founded upon the impolicy of allowing a man to avoid debts with impunity. But the constitution does neither. It has nothing to do with allowing men to commit torts, or to avoid debts. It looks away from these, not as favoring them, but to the paramount object of establishing homesteads."

¹⁶⁸ Robinson v. Wiley, 15 N. Y., 489.

¹⁶⁹ *Ibid.* Opinion by Bowen, J., Shankland, J., concurring.

superficial course of reasoning, since the representation operated, and was designed to operate, to deceive the creditor into the belief that, except the small mortgage, the house was subject to execution, when, by filing a declaration of homestead, the debtor had withdrawn it from execution as effectively as though he had mortgaged it for its full value. The question thus left in so unsatisfactory a state by the highest court of New York has been before and since distinctly decided by the intermediate appellate courts of that state—the supreme courts; these courts holding that the statute does not protect property from executions issuing to enforce judgments for torts or judgments for costs obtained in actions for tort.¹⁷⁰ Under a statute similar in terms¹⁷¹ the supreme court of Georgia had no difficulty in holding that the property of a judgment debtor was not protected if the judgment was rendered in an action for a tort. “Whether this discrimination should be made,” said Lumpkin, J., “it is for the legislature, and not for the courts, to decide.”¹⁷²

How as to *judgments for costs* in actions for tort? Grouping the decisions under this head, we find, as just seen, that in New York a judgment rendered against the plaintiff for costs, in an action brought by such plaintiff for damages for an alleged tort, is not a judgment for a “debt contracted,” within the meaning of an exemption law of that state, and is, hence, leviable out of property otherwise exempt under the statute.¹⁷³ But the contrary was held in Pennsylvania,

¹⁷⁰ Schouton v. Kilmer, 8 How. Pr. 527; Lathrop v. Singer, 39 Barb. 396. And see Cook v. Newman, 8 How. Pr. 523, where Pratt, J., reasons clearly in support of this doctrine, and then, by an unaccountable *faux pas*, decides exactly the other way.

¹⁷¹ Cobb's Dig. Ga. Stats. 385, 389, 390.

¹⁷² Davis v. Henson, 29 Ga. 345.

¹⁷³ Schouton v. Kilmer, 8 How. Pr. 527; Lathrop v. Singer, 39 Barb. 396. Said the court: “There is no language found in the act indicating an intention to exempt from sale any property on judgments, except for debts contracted. If the intention had been to extend the exemption to sales under all judgments recovered, it would have been quite easy to have so expressed it; and it is most likely, if that had been the intention, that it would have been so expressed in the act. The omission to do so, and the limitation in words

under a statute limiting the exemption to judgments obtained upon contract and distress for rent. The plaintiffs in an action of trover were adjudged to pay the costs, and it was held that, as against this judgment, they could hold the property exempted by the statute.¹⁷⁴

VIII. *Public Debts.*

It is a very old maxim that "the king is not bound by any statute if he be not expressly named to be so bound."¹⁷⁵ "The king," says Mr. Broom,¹⁷⁶ "is not bound by any statute if he be not expressly named therein, unless there be equivalent words, or unless the prerogative be included by necessary implication; for it is inferred, *prima facie*, that the law made by the crown, with the assent of the lords and commons, is made for subjects, and not for the crown."¹⁷⁷ This maxim is said to extend to the ancient prerogative of the king, and to those rights which are incommunicable and appropriate to him in his regal capacity.¹⁷⁸ Familiar illustrations of it are found in the rule that the statutes of limitation, of set-off, and of frauds do not affect the king.¹⁷⁹ Yet it admits of these broad exceptions: That, "if a statute is intended to give a

to debts contracted, afford pregnant evidence that the legislature did not intend to extend its operation beyond the cases expressed."

¹⁷⁴ *Lane v. Baker*, 2 Grant's Cas. 424. "When a plaintiff in an action of trover is cast," said Black, J., "and the judgment is against him for costs, he is not thereby put into the situation which the defendant would have occupied if the luck had been reversed. A party is not a trespasser because he sues another for trespass. Costs against the plaintiff are not like damages against the defendant. We are of opinion that a judgment for costs is to be considered in the same light as a judgment for debt on contract, so far as the exemption law affects the rights of the parties. The fact that the costs accrued in action for a tort makes no difference. This makes any further allusion to the argument of the plaintiffs in error unnecessary."

¹⁷⁵ In law French the maxim runs thus: "*Roy n'est lié par aucun statut, si il ne soit expressement nomé.*" Jenk. Cent. 307.

¹⁷⁶ Broom's Leg. Max. 72.

¹⁷⁷ *Wright v. Mills*, 4 H. & N. 491; 9 Exch. 631; *Evans v. Jones*, 3 H. & C. 423.

¹⁷⁸ Broom's Leg. Max. 75.

¹⁷⁹ Broom's Leg. Max. 74; Bac. Abr. (Am. ed. 1876), tit. Prerogative, E. 5, and cases cited.

remedy against a wrong, the king, though not named, shall be bound by it; and the king is impliedly bound by statutes passed for the public good, the preservation of public rights and the suppression of public wrongs, the relief and maintenance of the poor, the general advancement of learning, religion, and justice, or for the prevention of fraud.”¹⁸⁰ In the United States the same principle has been held applicable to the Federal and State governments.¹⁸¹ Here it is said to rest “not upon any notion of prerogative, for even in England, where the doctrine is stated under the head of prerogative, this, in effect, means nothing more than that this exception is made from the statute for the public good, and the king represents the nation. The real ground is a great principle of public policy—which belongs alike to all governments—that the public interests should not be prejudiced by the negligence of public officers to whose care they are confided.”¹⁸²

It would seem that an application of this principle to homestead and exemption laws in which the state is not expressly named would result in the conclusion that the state is not bound by such laws, especially where so to hold would contravene rights belonging to the state peculiarly in its political character, such as the right to collect its rev-

¹⁸⁰ *Ibid.* 73; Bac. Abr., tit. Prerogative, E. 5. See 1 Bl. Com. 261; 1 Kent's Com. 460; Comyn's Dig., tit. Parliament, R. 8.

¹⁸¹ United States v. Knight, 14 Pet. 315; Com. v. Cook, 8 Bush, 225; Com. v. Lay, 12 Bush, 283; Divine v. Harvie, 7 T. B. Mon. 443; State v. Garland, 7 Ired. 50; People v. Rossiter, 4 Cow. 143; State v. Kinne, 41 N. H. 238; Com. v. Baldwin, 1 Watts, 54; United States v. Hewes, Crabbe, 307; Brooks v. The State, 54 Ga. 36.

¹⁸² United States v. Knight, 14 Pet. 315, *per* Mr. Justice Barbour. But, in view of the rule and its limitations, the act of Congress of May 19, 1828, regulating process in the courts of the United States, which extended to prisoners under execution the privileges of the jail limits, embraced executions at the suit of the United States; since the statute “proposes only to regulate the mode of proceeding in suits, does not divest the public of any right, does not violate any principle of public policy; but, on the contrary, makes provisions in accordance with the policy which the government has indicated, by many acts of previous legislation, to conform to state laws in giving to persons imprisoned under their execution the privilege of jail limits.” *Ibid.*

enue.¹⁸³ In many of the states this question is determined by the express provisions of statutes which declare, in various terms, that nothing shall be exempt from execution where the debt, other than public taxes, is due the state;¹⁸⁴ or where the debt is for public taxes legally assessed upon the homestead or other property;¹⁸⁵ or where the demand is

¹⁸³ It is thought that the rule could well be otherwise in case the state were engaged in any private business, such as becoming stockholder in a bank, or the like.

¹⁸⁴ Arkansas—Exemption of homestead "shall not be extended to persons who may be indebted for dues to the state, county, township, or other trust funds." Stat. 1874, ch. 56, sec. 2625. Nebraska—Neither homestead nor personal property is exempt from fines and costs of suit upon execution against defendant for the sale of liquors without license. Gen. Stat. 1873, ch. 58, sec. 590. Tennessee—Homestead and personal property are not exempt from execution on judgment for failure or refusal to work on public roads; from fines for carrying concealed weapons; from fines for selling intoxicating liquors; from fines and costs for voting out of the district in which the voter resides. Stat. 1871, vol. 1, sec. 2111 *a*.

¹⁸⁵ Arkansas—Homestead "not exempt from sale for taxes," Stat. 1874, ch. 56, sec. 2625. Arizona—As to homestead and personal property, Compiled Laws 1871, ch. 37, sec. 10. Colorado—Homestead and personal property "not exempt from sale for payment of any taxes whatever, legally assessed," Rev. Stat. 1868, ch. 48, sec. 33. Delaware—As to personal property, Rev. Code 1852, ch. 111, sec. 2. Dakota—As to homestead "for taxes accruing thereon," Rev. Code 1877, p. 183, sec. 4. Georgia—*Ibid.*, Code 1873, sec. 2002. Illinois—As to homestead and personal property "for taxes or assessments," Rev. Stat. 1877, ch. 52, sec. 3. Indiana—*Ibid.*, Stat. 1876, vol. 2, ch. 11, sec. 14. Iowa—Homestead "liable for taxes accruing thereon," Code 1873, sec. 1991. Kansas—Homestead and personal property not exempt from taxation or sale for taxes "under the laws of this state," Gen. Stat. 1868, ch. 38, secs. 1, 5. Louisiana—No property "exempt for non-payment of taxes," etc., Dig. Stat. 1870, vol. 1, p. 701. Massachusetts—As to homestead, Gen. Stat. 1860, ch. 104, sec. 5. Michigan—*Ibid.*, Compiled Laws 1871, vol. 2, sec. 6143. Minnesota—"Real estate" not exempt from taxation or sale for taxes, Bissell Stat. at Large, ch. 32, title 5, sec. 171. Mississippi—As to homestead and personal property, Code 1871, sec. 2142. Missouri—As to homestead (by implication from revenue law); as to personal property, by direct provision, not exempt for taxes "due the state, or any city or county," Wag. Stat., ch. 118, sec. 12; ch. 55, sec. 15. Nebraska—As to homestead and personal property, Gen. Stat. 1873, ch. 57, sec. 524. New Jersey—As to personal property, Rev. Stat. 1874, p. 286, sec. 10. New Hampshire—As to homestead, Gen. Stat. 1867, ch. 124, sec. 18. New York—*Ibid.*, Edmond's Stat. at Large, vol. 4 (2d ed.), p. 633, sec. 2. North Carolina—As to homestead and personal property, Battle's Revisal, ch. 55.

for a public wrong committed, punished by fine.¹⁸⁶ But where the question has arisen in the silence of statutes, the highest courts of the states, with two exceptions,¹⁸⁷ have held otherwise.¹⁸⁸ In Illinois a statute provided that the bond of a tax-collector should be a lien upon all his real estate situated within the county at the time of the filing of the bond.¹⁸⁹ But it was held that a judgment against a collector upon a bond which was thus a lien on his realty was not a lien on his homestead. A judgment against a private person was not, in that state, a lien on the homestead of the judgment debtor,¹⁹⁰ and it has been said that the state was not, in respect of its revenue, in any better position than the citizen was placed in in regard to the collection of his debt.¹⁹¹

In a later case the same court went further, and held that the two statutes protected a homestead from sale under

sec. 1. South Carolina—*Ibid.*, Const., Art. 2, sec. 32. Tennessee—*Ibid.*, Stat. 1871, vol. 1, secs. 2111 *a*, 2114 *a*. Texas—As to homestead "for taxes assessed thereon," Const., Art. 12, sec. 15. Vermont—*Ibid.*, Gen. Stat. 1868 (App. 1870), ch. 68, sec. 8. Virginia—As to homestead and personal property not exempt from "lawful claim for any taxes," Code 1873, ch. 183; sec. 1. West Virginia—As to personal property, Code 1868, ch. 41, sec. 28. Wisconsin—As to homestead, Rev. Stat. 1871, vol. 2, p. 1550, sec. 31. Nevada—As to homestead and personal property, Compiled Laws 1871, vol. 1, p. 62, sec. 193.

¹⁸⁶ Nebraska—For fine and costs of suit upon an execution issued for the sale of liquors without license, Gen. Stat. 1873, ch. 59, sec. 590. Tennessee—For judgment for failure or refusal to work on public roads; for fines and costs for voting out of the district in which voter resides; for carrying concealed weapons; and for selling intoxicating liquors, Stat. 1871, vol. 1, sec. 2111 *a*.

¹⁸⁷ *Com. v. Cook*, 8 Bush, 220; *Brooks v. State*, 54 Ga. 36. Two *nisi prius* courts in Pennsylvania have reached similar conclusions, but on other grounds. *Com. v. Dougherty*, 8 Phila. Rep. 366; *Com. v. Whiteside*, Lancaster Bar, Sept. 25, 1869.

¹⁸⁸ *Green v. Marks*, 25 Ill. 221; *Hume v. Gossett*, 43 Ill. 297; *Loomis v. Gerson*, 62 Ill. 12; *State v. Pitts*, 51 Mo. 133; *Gladney v. Deavors*, 11 Ga. 89; *Com. v. Lay*, 12 Bush, 283.

¹⁸⁹ Sess. Acts of 1851, sec. 7, p. 53; Sess. Acts of 1861, p. 227.

¹⁹⁰ *Green v. Marks*, 25 Ill. 221.

¹⁹¹ *Hume v. Gossett*, 43 Ill. 297.

a judgment rendered for a *fine* and *costs* in a prosecution for a misdemeanor.¹⁹²

The same result was reached in Missouri, but under a statute entirely dissimilar in terms. The act in question¹⁹³ provided that the homestead therein defined should be "exempt from attachment and execution, except as herein-after provided." There was nowhere any proviso saving debts due to the state. The court held, in an ably-reasoned opinion by Wagner, J., that the statute protected the homestead from sale under an execution issued against the surety on a forfeited recognizance, although the debt in such a case was due to the state.¹⁹⁴

The contrary doctrine has been twice held by *nisi prius* courts in Pennsylvania, under an exemption law limited to judgments obtained upon contract.¹⁹⁵

But, under a statute¹⁹⁶ making the bond of a tax-collector a lien on his property from the date of its execution, it was held the wife of a defaulting tax-collector cannot acquire such a right of homestead in his lands, by having a homestead set apart to her by the court of ordinary, as will exclude the state's lien. The bond was given and the default occurred in 1867, prior to the adoption of the constitution of

¹⁹² Loomis v. Gerson, 62 Ill. 12. "The object of these laws," said the same learned judge, "was to furnish a shelter for the wife and children which could not be taken away or lost by the act of the husband alone. This principle must equally exempt the homestead from sale under a judgment for a fine and costs rendered in a criminal prosecution for a misdemeanor. The wife is not to suffer for the wrongful act of the husband. The state must submit to the same exemptions of a defendant's property that it imposes upon its citizens."

¹⁹³ 1 Wag. Stat. 697, sec. 1.

¹⁹⁴ State v. Pitts, 51 Mo. 133.

¹⁹⁵ Pennsylvania Act of April 9, 1849; Bright. Purd. Dig. 636, sec. 20; Com. v. Dougherty, 8 Phila. Rep. 366 (Philadelphia quarter sessions, Pierce, J.); Com. v. Whiteside, 1 Lancaster Bar, Sept. 25, 1869. These cases hold that a recognizance in a criminal case, though in some sense a contract between the commonwealth and the party thereto, is in its nature a part of the criminal proceeding; in support of which see *Respublica v. Cobbet*, 2 Yeates, 352; Com. v. Commrs. 8 Serg. & R. 151.

¹⁹⁶ Georgia Code of 1873, sec. 913.

1868 containing the enlarged homestead exemption. If, therefore, the contest had been between citizen and citizen, it would have been governed by the rule in *Gunn v. Barry*; ¹⁹⁷ the provision of the constitution could not act retrospectively, so as to discharge the contract; and the same rule was equally applicable to the state.¹⁹⁸ The supreme court of Georgia has gone so far as to hold that a statute exempting from execution for debt certain articles of personal property, such as beds and bedding, bedsteads, spinning-wheel, a loom, a cow and calf, tools, cooking utensils, a family bible, etc., bound the state, although the state was not named therein, so that the exempted articles could not be sold for public taxes. This statute is not accessible to the writer, nor is its language set out in the report of the case under consideration, so that it is left to conjecture whether the exemption was restricted, like many statutes of this kind, to "debts contracted," or whether it created a general immunity against all process of what nature soever. But the opinion of the court is so interesting and instructive that we advise its perusal.¹⁹⁹

The Kentucky case, already named, which holds that the rule that the state is not bound by statutes in which it is not expressly named applies to a homestead exemption law,²⁰⁰ was a suit in equity by a defaulting sheriff and his sureties to enjoin the enforcement of a judgment which had been rendered against them on a bond given by them for the collection of the state's revenue. An execution issuing from the judgment had been levied upon lands of the sureties, and it was urged that these were exempt under the homestead law.²⁰¹ But the court held that, as the state was nowhere named in the homestead law, it was not bound by its provisions; Lindsay, J., saying: "As the government of the state is established for the good of the whole, and can only be

¹⁹⁷ 15 Wall. 610.

¹⁹⁸ *Brooks v. State*, 54 Ga. 36.

¹⁹⁹ *Gladney v. Deavors*, 11 Ga. 89.

²⁰⁰ *Com. v. Cook*, 8 Bush, 220.

²⁰¹ Kentucky Act of February 10, 1866; Meyer's Supp. 714.

supported by means of its revenues, courts, in the construction of general laws, will not ordinarily apply to the state such as, upon their face, seem to have been intended only for declaring or regulating the rights and remedies of private individuals, and which, if so applied, will have the effect of obstructing or rendering more difficult the speedy collection of the public dues. This rule is not only founded upon the highest public policy, but is warranted by the firmly-established maxim that 'general statutes do not bind the sovereign, unless expressly mentioned in them.' " In a very late case in the same state an attempt is made to limit the doctrine of this case, but it must be accepted, we think, as overruling it. Here the proceeding was in behalf of the commonwealth, to recover damages of a sheriff upon his bond, for failing to collect various executions issued in favor of the state against certain persons "for fines imposed or the costs of the proceedings to be paid the officers of the court," as is to be gathered from the imperfect report of the case. The defence was that the defendants in the execution had no property not exempt from execution under the homestead law; and this defence was, on demurrer, held good, the court saying: "While adhering to the doctrine in the case of *The Commonwealth v. Cook*, we are satisfied that ordinary executions for fines, costs, etc., in the name of the commonwealth, are embraced in the exemption laws of the state." ²⁰²

IX. Effect of Changing the Form of Indebtedness—Exchange of Securities—Renewals.

In those states where, either by the terms of the statutes themselves or by judicial construction, exemption laws are held not to apply to preëxisting debts, interesting questions have arisen as to whether particular debts are to be deemed as having been contracted prior or subsequent to the statute. Thus, where a note is given subsequently to the enacting of such a statute, in renewal of a note given previously thereto,

²⁰² *Com. v. Lay*, 12 Bush, 283.

the debt so evidenced is deemed to be a preëxisting debt, and unaffected by the statute; ²⁰³ the reason of the rule being that the renewal of a note is not a satisfaction of the debt, but only a change in the evidence of the debt.²⁰⁴ Nor does it make any difference that but *one* note is given in renewal of *two* notes previously existing.²⁰⁵ Accordingly, where a mortgagee was in possession under an entry to foreclose at the date of the passage of the Massachusetts homestead act of 1855,²⁰⁶ and afterwards took a new note and mortgage for the same amount, without release of homestead, and a few days later discharged the old mortgage and at the same time gave up possession, it was held that no estate of homestead was acquired by the mortgagee or his family as against the second mortgage.²⁰⁷

The rule is the same in case of a *higher security* taken for a preëxisting indebtedness—as, where a note is given for a simple-contract debt—it being considered in such cases that the note is not a payment, but a mere security; that the debt is the substantial thing, and the note the evidence of it.²⁰⁸ The same principle applies in case of a *second judgment* rendered in a suit upon a prior judgment; if the first judgment was privileged against the homestead, the second will be.²⁰⁹ In Pennsylvania the rule is said to be that whether or not a new security given for an antecedent debt is to be deemed a satisfaction of the original debt by substitution, depends upon the *intention* of the parties. And where a sealed note was, prior to the passage of an exemption law, given in settlement of a book-account debt existing previously thereto, and the note passed into the hands of a third

²⁰³ Pryor v. Smith, 4 Bush, 379; Kibbey v. Jones, 7 Bush, 243; Ladd v. Dudley, 45 N. H. 61.

²⁰⁴ McLaughlin v. Bank of Potomac, 7 How. 228; Lowry v. Fisher, 2 Bush, 70.

²⁰⁵ Ladd v. Dudley, 45 N. H. 61.

²⁰⁶ Stat. 1855, ch. 238.

²⁰⁷ Burns v. Thayer, 101 Mass. 426.

²⁰⁸ Weymouth v. Sanborn, 43 N. H. 171.

²⁰⁹ Mills v. Spaulding, 50 Me. 57. But compare Harlev v. Davis, 16 Minn. 487, as set out at length hereafter.

party, who obtained judgment upon it and levied upon the debtor's property, it was held—no intention appearing to extinguish the book-account debt by the sealed note—that the property was not protected by the exemption act.²¹⁰ So, where a creditor held the promissory note of his debtor for a debt contracted prior to the passage of the exemption law, which he delivered up, and it was cancelled, he receiving in its stead a bill single with warrant of attorney to confess judgment for the amount due, the judgment entered upon the same was not affected by the statute.²¹¹ So a note secured by a mortgage given subsequently to the passage of such a statute, in renewal of an unsecured debt existing before the statute, is not affected by the statute.²¹² And this principle is applicable to cases where the homestead was acquired prior to the passage of such a statute, as well as to those acquired subsequently thereto.²¹³

But it is said to be the settled law in Massachusetts that the giving of a negotiable promissory note is a payment of a simple-contract debt, unless it appears that it was not so intended. This presumption, however, is said to be repelled in a case where, by treating the new note as a payment, the creditor would lose the advantage of some security, as a mortgage, guaranty, or the like. It therefore does not apply where a note is given subsequently to the passage of an exemption law, in exchange for one made previous to the law, because the creditor would thereby lose the advantage of the exemption of the debtor's real estate from the right of homestead which the law gave him.²¹⁴ But in an earlier

²¹⁰ *Reed v. Defebaugh*, 24 Pa. St. 495. But the contrary has been held in North Carolina, the court saying that the legal effect of a bond is to create a debt, *proprio vigore*; and that this is especially so with respect to this question, since the date of the bond furnishes a guide to the levying officer as to his duties. *Dean v. King*, 13 Ired. 23.

²¹¹ *Weaver's Estate*, 25 Pa. St. 434.

²¹² *Strachn v. Foss*, 42 N. H. 43; *Wood v. Lord*, 51 N. H. 448. But see *Adams v. Jenkins*, 16 Gray, 146, cited below.

²¹³ *Wood v. Lord*, *supra*.

²¹⁴ *Tucker v. Drake*, 11 Allen, 147. In this case it is said by Hoar, J.: "It is true that the debtor intended that the transaction should produce this result, and the creditors were ignorant that it would have any effect upon their

case in the same state it was held that a promissory note, secured by a mortgage taken since the passage of the homestead exemption acts, in exchange for a note made before those acts and not so secured, was to be presumed to be taken in payment of the first note, and was, hence, affected by those acts.²¹⁵ These two cases, though not upon pre-

rights; so that it may be said there could not have been an intention that it should not be a payment. But we are of opinion that this is rather specious than sound. Whatever was the purpose of the debtor in his own mind, he did not communicate to the holders of the notes that anything else was proposed than a simple renewal of the notes. The reasons given for the exchange, that the old notes were covered with endorsements, or that the new ones were on handsomer paper, or that some persons thought an old note not so good as a new one, would lead to no other conclusion. The notes taken did not vary the obligation of those for which they were exchanged in any particular except by having a new date, which was merely a written admission of what the law implied from the existing facts. Some of the new notes were dated, not according to the fact when executed, but to correspond to the last payment of interest. We think the evidence shows that the creditors were, in substance, informed that a renewal was intended, and that this was the transaction to which they assented. That they were not aware that the legal effect of a renewal would differ from that of the payment of one note by another, would, then, be immaterial. In *Pomroy v. Rice*, 16 Pick. 24, it is said by Mr. Justice Wilde that a direction to renew a note, although by making it payable to a new payee, *ex vi termini* shows that the exchange of one note for the other was not intended to be a payment. And we find no case reported in this commonwealth in which the mere exchange of one note for another, without change of amount, parties, or time of payment, has ever been held to be a payment of the first. The debtor himself, in his examination in insolvency, says that he renewed these notes, and speaks of them as renewals. The proof of the new notes in insolvency, if these were mere renewals, would not affect the rights of the creditors. Within the meaning of the statute of 1855, therefore, they were still debts contracted before the passing of the act. The date of the notes merely gives the time of the new promise to pay a debt already contracted. It is not necessary to decide whether the new notes would be held to be new obligations in the hands of third persons if they had been transferred by endorsement. This case is between the original parties; and the transaction between them does not, for the reasons given, appear to us to involve the contracting of any new debt."

²¹⁵ *Adams v. Jenkins*, 16 Gray, 146. Bigelow, Ch. J., said: "There are no facts in this case from which it can be fairly inferred that the plaintiff's debt, secured by the mortgage under which he claims to recover the premises, was a debt contracted prior to the passage of the homestead act of 1855. On the contrary, by taking a new note in

cisely the same facts, are wholly opposed to each other in principle; and the later must undoubtedly be understood as overruling the earlier.

But where a note, given previously to the passage of such a statute, was barred by limitation, and, subsequently to the statute, was revived by the giving of a mortgage, it was held that the mortgage was subject to the exemption;²¹⁶ because a promise to pay a debt barred by limitation is, in effect, a new contract, and in such a case the cause of action is not the original debt, but the subsequent promise. And where, in case of the renewal of a note, there is a substitution of sureties, so that the person who signs as surety the new note, given since the statute, is a different person from that signing the previous note, the contract of the second surety is a new contract, dating from the time of his signing, and he will be protected by the statute.²¹⁷ The implied contract which the law raises between a principal and his surety, that the principal will indemnify his surety for any payment which the latter may make in consequence of his undertaking as surety, takes effect from the time when he signs or endorses as surety, and not merely from the date when the surety pays the debt. Therefore, where a statute provided that no property should be exempted from levy on execution "for a debt contracted"

lieu of the former one, with a mortgage to secure its payment, it is clear that the parties intended it as a new debt, and that the old debt was intended to be extinguished and paid. It is not a case where a party having a note secured by a mortgage surrenders it and takes a new note in its place, still retaining the mortgage as security. There the inference is that the party did not intend to take the new note in payment, because by so doing he would give up his security and receive nothing to take its place; the inference of payment is rebutted by the circumstances; a party cannot be presumed to intend to abandon his security; the more reasonable inference, therefore, is that renewal of the debt, and not its payment, was the purpose which the creditor had in view. But a different presumption arises when an old debt not secured is given up and a new note taken, with a mortgage as security. In such case the creditor may be presumed to receive the new note in payment of the old one."

²¹⁶ Grayson v. Taylor, 14 Tex. 675.

²¹⁷ Coles v. Kelsey, 2 Tex. 571; Bell v. Morrison, 1 Pet. 360; Van Keuren v. Parmelee, 2 Comst. 425; Ladd v. Dudley, 45 N. H. 61.

previously to its passage,²¹⁸ and where an obligation of suretyship was entered into before the passage of the act, and the surety paid the debt after its passage, the homestead of the principal was not protected as against the demand of the surety.²¹⁹

Another consequence of this provision of the Massachusetts statute was that a debtor who became insolvent, owing debts contracted before the passage of the act to an amount exceeding the amount exempted for a homestead, was under the necessity of surrendering his homestead to his assignee in insolvency, such assignee being entitled, under another statute,²²⁰ to "all property which might have been taken in execution" against the debtor.²²¹

Another application of the same provision was made in a case where a debtor, after the passage of the act, and after the passage of a subsequent act regulating the conveyance of homestead property, mortgaged his home place, but in such a manner as not to release his right of homestead; and it was held that a judgment debtor whose claim accrued prior to the former act might levy upon the equity of redemption, and the purchaser at the sale would take a title superior to the debtor's right of homestead. The mortgage had no other effect than to change the estate subject to the execution from an absolute title to an equity of redemption.²²²

Under an exemption law which excepts from its operation judgments and decrees "founded on any contract made" prior to its passage, it has been held that a *delivery bond* given to a sheriff for the forthcoming of the debtor's homestead, which had been levied upon under a judgment founded on a debt existing prior to the passage of the act, was not a "contract" within the meaning of the act. Such a bond was "a mere process provided by the statute as a means of

²¹⁸ Massachusetts Stat. of 1855, ch. 238, sec. 3.

²¹⁹ Rice v. Southgate, 16 Gray, 142.

²²⁰ Massachusetts Stat. of 1838, ch. 163, sec. 5.

²²¹ Woods v. Sanford, 9 Gray, 16.

²²² Howard v. Wilbur, 5 Allen, 219.

having execution of the judgment, and, at the same time, of giving indulgence to the defendant; and as such it was under the power of the court, and liable to be quashed as process of the court. The statute had reference to a contract made between the parties, upon which judicial proceedings should be, or had been, instituted, and not to the legal steps or process which might be allowed the defendant in the course of suit, judgment, and execution to enforce that contract.”²²³

Under an exemption statute of Tennessee, which by its terms applied only to executions issued upon judgments founded upon contracts entered into on and after February 1, 1833,²²⁴ it was held, in a case where the judgment was upon an *itemized account* for goods sold and delivered, some of the articles before, and some after, the date named in the statute, that the debtor was entitled to the exemption.²²⁵

For the same reasons a mere exchange of securities between the same parties, as the taking of a new note and mortgage in exchange for an old, will not change the nature of the debt so as to destroy the right of the *vendor* to satisfaction out of the premises sold and conveyed, although the purchaser may have occupied them as his homestead.²²⁶ Thus, where, on the purchase of a homestead, the purchaser and his wife executed a mortgage thereon to secure the

²²³ Smith v. Brown, 28 Miss. 813.

²²⁴ Tennessee Act of 1833, ch. 80; Car. & Nich. Stat., p. 535.

²²⁵ Bachman v. Crawford, 3 Humph. 213. “The plaintiff in the execution,” said Green, J., “had his right of action for the articles delivered in 1833, and, if he had chosen, might have brought his suit at the end of that year for the recovery of their value. But he chose to let the account run on unliquidated, and to sue for the whole in this action. He cannot, by his voluntary act, thus deprive the party against whom the execution issued of a right secured by law. The defendant could not, by any form of pleading known to the law, have caused the proceeding to be reversed, so that one judgment should be rendered for the sum due in 1833, and the other for the articles obtained after the 1st of February, 1834.”

²²⁶ Pratt v. Topeka Bank, 12 Kan. 570; Dillon v. Byrne, 5 Cal. 455; Birrell v. Schie, 9 Cal. 104; Austin v. Underwood, 37 Ill. 441; Wofford v. Gaines, 53 Ga. 485. *Contra*: Harlev v. Davis, 16 Minn. 487.

purchase-money, and other indebtedness of a kind such as a homestead is exempt from liability for, and thereafter a portion of the mortgage having been paid, and such mortgage is surrendered and a new mortgage executed by the husband alone for the balance, the creditor can enforce a lien upon the homestead for so much of the debt secured by the second mortgage as is for the purchase of the land, and interest, but not for the balance.²²⁷ So, under the statute of California, which in defining the homestead exemption protected the vendor's lien from its operation, it was early held that an assignee of a note given for purchase-money would succeed to the rights of the vendor in this regard, and that such assignee did not waive this right by making an additional loan to the purchaser, cancelling and satisfying of record the old mortgage, and taking a new one, in which the wife did not join, as security for the whole. But in enforcing such a mortgage the homestead would be subjected only to the extent of the unpaid purchase-money; as to the rest, the mortgagee must look to other property of the mortgagor.²²⁸

²²⁷ Pratt v. Topeka Bank, 12 Kan. 570.

²²⁸ Dillon v. Byrne, 5 Cal. 455. The following is the reasoning of the court, Murray, Ch. J., delivering the opinion, Heydenfeldt, J., concurring: "The statute of this state exempts the homestead from forced sale, except as to mechanics', laborers', or vendors' liens, or mortgages lawfully obtained. It is further provided that no mortgage, sale, or alienation of said land shall be valid except the same is signed by the wife. There can be no doubt that, by the provisions of the act just quoted, the land would be liable for the remainder of the purchase-money, no matter to what purpose it might be devoted. It is charged with a debt which can only be discharged by payment, voluntary relinquishment, or the acceptance of some new or other security. Has there been any substitution of a new security, or any act of the plaintiff tending to show a relinquishment of his claim to hold the land subsequent to the mortgage? I think not. The additional loan and the new mortgage show a disposition to hold the lot for the debt, and in point of law the execution of the new, and the satisfaction of the old, mortgage may be regarded as simultaneous acts. A court of equity will not lend its aid to do an injustice, and assist a party in escaping from a just liability which he has contracted. The authorities which have been cited in relation to the vendor's lien have no application in this case; the rights of the parties before us grow out of the statute. Treating the mortgage as a mere security for the purchase-money, it is evident that the debt could not be lost by the acceptance of a new mortgage intended to supply the old one and secure the same debt. We are of opinion that, while the land was chargeable for the purchase-

So the supreme court of Illinois held that a mere change of securities between the same parties does not destroy the immunity given by the statute to the vendor; and that the rule is the same where the purchase-money has been advanced by a third person, under such circumstances that the statute extends to him the same immunity. It was so held where a third person had advanced money to purchase land, and had taken a mortgage on this land as his security, and had afterwards released the mortgage and taken security under a deed of trust covering this and other property.²²⁹ But in an earlier case in that state A had purchased land of B on a credit, executing his notes for the purchase-money, and B had sold these notes to C, and C had adjusted the claim with A by taking a note to himself, which he had assigned to D, the plaintiff in the suit, upon which the judgment was obtained. It was held, in substance, that the new note did not carry with it the quality of a note for purchase-money so as to be protected by the statute.²³⁰ In Georgia, where a promissory note, given for land and payable to the vendor *or bearer*, passed into the hands of a third person, and, whilst he was the owner thereof, was renewed by the maker, and the new note, with a party added thereto as security, was made payable to the holder of the former one, this was held not to be such a novation of the original contract as would prevent the homestead laid off in the land from being sold to satisfy a judgment founded on the renewed note. "The bearer" with whom the new contract was made was a party to the old contract, and the renewed note was, equally with the former one, a note for the purchase-money.²³¹

money, that charge could not be evaded by the execution of any new mortgage designed to secure the debt. But, at the same time, we are of opinion that no more than the actual amount of the purchase-money and interest remaining due can be made out of the lot; and that for the excess plaintiff must proceed on his other security, or against the party, but not against the homestead." The doctrine of this case is reaffirmed in *Birrell v. Schie*. 9 Cal. 104.

²²⁹ *Austin v. Underwood*, 37 Ill. 441.

²³⁰ *Phelps v. Conover*, 25 Ill. 314.

²³¹ *Wofford v. Gaines*, 53 Ga. 485. "It is admitted," said McCay, J..

But in Minnesota, under a statute creating an exemption of personal property except in actions for the purchase-money thereof,²³² where the seller of an article exempt under the statute took a note therefor, which he endorsed to a third person, and such holder obtained judgment thereon against the purchaser of the goods as maker, and against the seller as endorser, and the seller paid the judgment and brought an action against the purchaser for the amount so paid, in which he caused the article sold to be seized under an attachment, it was held that this second action could not be regarded as an action for the purchase-money, and that the purchaser could, hence, hold the article as exempt. The reasons given by the court for so holding were that the purchaser's contract as maker, and the seller's as endorser, were merged in the judgment obtained by the holder, as a superior security. The court said that when the seller paid the judgment he satisfied and extinguished it, but he did not thereby become the owner of it, nor the owner of the note or of the original indebtedness evidenced by the note. But such payment conferred upon the seller a right of action as payee and endorser against the purchaser, the maker, as in *assumpsit* for money paid, to the extent of the principal and interest of the note, and not for the purchaser's original indebtedness for the articles sold, which had lost its character as

“that if the renewal had been to the original payee, though a security was added, there would have been no such novation as made a new contract. But when the renewal was made the note belonged to the bearer, and the question is, Did the renewal to him alter the case? We think not. The note was payable to him. He was contracted with in terms at the giving of the note. This has been formally held by the Supreme Court of the United States, in reference to the jurisdiction of the United States courts in suits brought by holders of notes payable to bearer. And this is a fair view of the nature of such a contract. The maker, in terms, contracts to pay the bearer. When the note goes into the hands of the bearer, he is the party to it. If it be renewed, it is renewed with one of the parties to it, and the renewal is simply a contract fixing a new day as to the same matter, and with no new or different consideration. No new party to whom the obligation is due is introduced. We think, therefore, that this was no such novation as made this a new debt not in existence in July, 1868, at the adoption of the homestead law.”

²³² Gen. Stat. Minn., ch. 66, secs. 269, 280.

such indebtedness and become merged in the judgment obtained by the holder of the note.²³³

SEYMOUR D. THOMPSON.

ST. LOUIS.

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²³³ *Harlev v. Davis*, 16 Minn. 487. I have thus stated the reasoning of the court at length because I do not wish to be thought unfair in expressing the opinion that it is wholly destitute of force, and that the result arrived at is equally destitute of justice. The court mistook the *evidence* of the debt for the debt itself. It was not the *debt* which was merged in the judgment obtained by the holder of the note, but it was the *note*, the evidence of the debt. This note, which was merely a security for a debt, was, in the language of the court, "merged in the judgment as the superior security." It was, therefore, merely an exchange of securities, and this, as already seen, does not alter the character of the debt itself. In the light of these decisions the reason given by the court seems a mere subtlety, which resulted in defeating the express provision of a statute which was framed to prevent a result so unconscionable as that the purchaser of an article should keep and enjoy the article itself, and withhold from the seller the purchase-money.



III. TRIAL BY JURY.

This is a subject on which much nonsense is spoken and written. Trial by jury has the advantage of immemorial usage upon its side. The freest, most civilized, and advanced nations—England and America—have jealously guarded it as an effectual defence and protection of their civil rights. Their example has been followed, in the criminal department of law at least, by other enlightened nations as fast as they have broken the chains of tyranny, prejudice, or ignorance. But, of late, there has sprung up in this country a widespread disposition—and that, too, in the minds of many of the best informed—to question, and even deny, the utility and sense of continuing the jury system in civil cases, although they freely admit that it is the best system yet devised for the trial of criminal cases.

They say there is no magic in a name. A system which may be efficient, and which may have acquired renown, when applied in one mode, may, when regarded in another light, and applied in other circumstances to a different state of things, be productive of inconvenience, uncertainty, injustice, and ruin. That the system has been found beneficial in criminal trials is not conclusive as to its fitness for all trials whatsoever. They represent that our criminal jurisprudence is simple; that it is learned without protracted study; that it forms but a little part of professional education; and what the gentlemen of the law treat with such easy indifference it would not be difficult for an unlettered jury, under the direction of a judge, to comprehend and apply. The fact to be ascertained is generally divested of those complicated matters which create all the difficulty in the determination of the matters of civil right. A crime has been committed, and the proof adduced to bring home the guilt of the accused is in

few cases beyond the understanding of a jury. The nature of the trial excites their interest and enlivens their attention; the mode of procedure is calculated to enlighten even the dullest, and the high responsibility which humanity feels at issuing an award of life or death removes a criminal trial beyond the reach of considerations which must decide the competency of juries for the settlement of matters civil. A nation tenacious of its liberties could not, moreover, in political cases, endure that these should be annihilated without the free consent of the citizens by whom they were secured. Judges, elevated above their position in society, might have no sympathy with the motives that actuated the accused, but which found a welcome reception in the hearts of his fellow-citizens. In all countries judges are generally the organs of the government, though less so in the United States than elsewhere; and the jealousy with which their proceedings are regarded has found too just a foundation in the frequency with which their powers have been abused. To give them the power of deciding on the guilt of criminals would prove detrimental to the well-being of society, by shaking public confidence in the officers by whom its peace is to be preserved. On subjects of great public interest, where popular excitement has taken the reins from reason, and popular passion has created indifference to consequences, it would stimulate insurrection, or create suspicion, anarchy, and discontent, were such excesses checked but by the people themselves. In short, to impose this duty on the judges would be to dig the grave of the purest virtue, which would inevitably sink beneath the malignity of popular detraction.

It is claimed that in criminal justice the simplicity of the procedure, the general simplicity of the fact to be tried, and the general principles of justice tempered with humanity which ought to guide the decision, render the rude judgment of twelve unlettered men fit enough for serving the object of criminal justice. That an erroneous verdict here is not fraught with such gross oppression as in a civil matter; society is the opposing litigant to the accused; its broad and

ample shoulders can well bear that one unprincipled adventurer should be let loose for a little longer to weigh upon them—to add an additional wrong to those which a stupid jury has let pass unpunished—consoling itself with the reflection that it is better it should be so than have an after-resurrection of repentance, on proof of the innocent being condemned. That a rough and sound verdict of this kind does not, indeed, in any case defeat the object of the trial. Though the punishment which the law imposes as a consequence of a verdict of guilty cannot follow, yet the accused cannot retire from his long interview with the judicial authorities unaffected by the narrow escape which he has had; and the solemnity of the trial operates often as much in the way of example as the horror of the execution.

But the same persons who agree in the views just expressed, and urge the expediency, and even necessity, of a jury in criminal trials, at once deny that they have any meaning or application in regard to civil cases. Here, they say, the jury in favoring A do injustice to B, and, while an approximation to a correct judgment on the evidence is all that is required of a criminal jury—their leaning, it is supposed, being to mercy—it is essential in civil cases, to avoid rendering the whole proceeding a very mockery, and the verdict of the jury a libel upon justice, to weigh in the nicest scales the whole circumstances of the case, to its minutest particular; to subject the law to no crude notions of justice, or the rules of evidence to the fanciful presumptions from character or preconceived opinions.

It cannot be denied that plausible arguments may be urged against the fitness of a jury to determine the intricate questions that often arise in civil actions. Nor will it be thought a sufficient answer to say that the system has in this and the mother country antiquity to recommend it. We live in times when this plea is treated with small respect. A better reason for the continuance of an institution must be given than that it has been handed down to us by our forefathers, although this alone ought to raise a presumption in its favor, and throw upon an opponent the burden of proving his objection.

"When the English adopted trial by jury, they were a semi-barbarous people; they have since become one of the most enlightened nations of the earth, and their attachment to this institution seems to have increased with their increasing cultivation. They have emigrated and colonized every part of the habitable globe; some have formed colonies, others independent states; the mother country has maintained its monarchical constitution; many of its offspring have founded powerful republics; but everywhere they have boasted of the privilege of the trial by jury. They have established it, or hastened to reestablish it, in all their settlements. A judicial institution which thus obtains the suffrages of a great people for so long a series of ages, which is zealously reproduced at every stage of civilization, in all the climates of the earth, and under every form of human government, cannot be contrary to the spirit of justice."

In his great work, "Democracy in America," M. De Tocqueville thus speaks of trial by jury in civil causes:

"The institution of the jury, if confined to criminal causes, is always in danger; but, when once it is introduced in civil proceedings, it defies the aggressions of time and man. If it had been as easy to remove the jury from the manners as from the laws of England, it would have perished under the Tudors; and the civil jury did, in reality, at that period, save the liberties of England. In whatever manner the jury be applied, it cannot fail to exercise a powerful influence upon the national character; but this influence is prodigiously increased when it is introduced into civil causes. The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged, and with the notion of right. If these two elements be removed, the love of independence becomes a mere destructive passion. It teaches men to practice equity; every man learns to judge his neighbor as he would himself be judged. And this is especially true of the jury in civil causes; for, whilst the number of persons who have reason to apprehend a criminal prosecution is small,

every one is liable to have a law suit. The jury teaches every man not to recoil before the responsibility of his own action, and impresses him with that manly confidence without which no political virtue can exist. It invests every citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society, and the part which they take in its government. By obliging men to turn their attention to other affairs than their own, it rubs off that private selfishness which is the rust of society."

He moreover claims that it is a great instrument for the education of the people; that it contributes powerfully to form the judgment and increase the natural intelligence of the people. It may be regarded as a gratuitous public school, ever open, in which every juror learns his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes particularly acquainted with the laws, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even by the passions of the parties; that the practical intelligence and political good sense of the Americans are mainly attributable to the long use which they have made of the jury in civil causes.

These are weighty reasons in favor of the jury system. And they are borne out by the advancement and the experience of other nations. The Danish jurist, Repp, well expresses this view when he says: "All modern nations (European and American at least), in so far as they dare express their political opinions, though disagreeing in many other points in politics, seem to agree in this: that they consider trial by jury as a *palladium*, which, lost or won, will draw the liberty of the subject along with it. In the many constitutions which have been projected or established in the nineteenth century, most other things were dissimilar and local; this alone was a vital point, a *punctum saliens*, from which it was expected that the whole fabric of a liberal constitution would be spontaneously dated." And, in all revolutionary movements in the nations of the continent, this mode of trial has been put in the van of their demands.

Trial by jury makes the law plain to the comprehension of, and popular with, the people, whom it most concerns. It was said of Socrates that he first drew philosophy from the clouds, and made it walk upon the earth. And of the civil jury it may also be said that it is an institution which draws the law from the clouds of technicality and abstraction, in which it is prone to hide, and makes it walk upon the earth, and familiarize itself with the unlearned and poor, and teach them, as well as the more favored and exalted, the nature and extent of their legal rights and remedies.

The object of all judicial investigation is the discovery of truth. Suppose the jury were abolished; what shall we substitute in its place? Shall we place upon the judge the burden of deciding both the law and the fact? Forsyth, in his "History of Trial by Jury," says: "To say nothing of the exhaustion of mind which would be felt by a judge called upon in the rapid succession of causes tried at *nisi prius* to weigh contradictory evidence and balance opposing probabilities, although it may sound paradoxical, it is true that the habitual and constant exercise of such an office tends to unfit a man for its due discharge. Every one has a mode of drawing inferences in some degree peculiar to himself. He has certain theories with respect to the motives that influence conduct. Some are of a suspicious nature, and prone to deduce unfavorable conclusions from slight circumstances. But each is glad to resort to some general rule by which, in cases of doubt and difficulty, he may be guided. And this is apt to tyrannize over the mind when frequent opportunity is given for applying it. But in the ever-varying transactions of human life, amid the realities stranger than fiction that occur, where the springs of action are often so different from what they seem, it is very unsafe to generalize, and assume that men will act according to a theory of conduct which exists in the mind of the judge. These views are just, and will be confirmed by every lawyer of capacity and experience.

But to all this it is often answered, the fault of the jury system consists in this: that it is a system of humbug and, frequently, of perjury. The jury are set apart in a box and

told that they are judges. The lawyers address them as judges. The judge addresses them as judges. To be sure, he tells them flatly they must not meddle with the law, and that they must take it from his mouth; but he tells them, also, they are the judges of the fact, although he may probably annul their verdict because they have misjudged the fact. This mode of treating them as judges flatters their vanity, and flatters the vanity of the populace, who are told they are judged by their country—meaning thereby that they are judged by each other; whereas, in reality, their transactions are judged of according to law as expounded by professional lawyers. Some jurymen think themselves judges, occasionally try to judge for themselves, but, oppressed by the law of unanimity, and their own want of experience in business, they are compelled to yield after an ineffectual struggle, and to give way to a majority of their brethren, who usually obey the direction of the judge. The minority in such cases, it is alleged, are sure to incur the guilt of perjury, and sometimes the whole jury do so. They are sworn to try the cause; but, instead of doing so, which would require a special exercise of judgment in each man, and thereby lead to strife, they retire, for safety and ease, to apathy, and wait to hear and obey the opinion of the judge.

All this is wrong, these objectors claim. And they enquire, with a fine show of indignation, Why should the forms of a barbarous age be maintained to the effect of producing deception? Why should not justice be administered under forms consistent with truth and honesty and sound principle, and in such a way that all may understand what is doing—that a man may know under what sort of government he actually lives, what place he holds, and what place other men hold, and what duties they perform to the community? Why should jurymen be puffed up with the notion that they are judges, when so many inventions have been devised to limit and annul their decisions, and have even been rightly and necessarily devised, as all admit who know anything of such proceedings?

It appears to us that all this heat and all these objections

come from misconstruction and misunderstanding, wilful or ignorant, of the proper province of a jury. They are to decide the controverted facts of a cause, under the law as given them by the judge. If they go contrary to the law their verdict will be set aside. But, as to the facts, they are the supreme arbiters. If their verdict is against *all* the evidence, the judge will not allow it to stand. But, if it is a question of the weight of evidence, however much there may be on one side, and however little on the other, and whatever the judge's private opinion may be, the conclusion of the jury upon such evidence, in civil causes, must stand.

The trial by jury, then, is in reality a trial by one's peers. England and America were the first countries on earth that, at least in modern times, attained to a perfectly fair administration of justice, while they had a fixed system of law. This is mainly to be ascribed to trial by jury. One great value of a trial by jury consists in the control over judges which it gives to the public. Parties meet each other publicly; each brings forward his evidence publicly. The import of the case on both sides is stated before the public. The judge conducts the proceedings, and virtually decides the case, in the face of the public. The use of the jury is that the judge cannot decide the cause by merely declaring, in a form of words, that the plaintiff has gained, or the defendant has gained, his cause. A dozen ordinary men have been set apart, by lot, in a box; there they sit; they have heard and seen all that passed, and the judge, by his conduct and decisions during the trial, must satisfy them that he is right. If he fail, they have it in their power, for a time at least, to put a negative upon his judgment.

Most signal benefits result from this. The people are constrained to elect (we believe that the election of judges is a bad system) men experienced in business and learned in the law. An ignorant man in such a situation would never be able to control the lawyers, and would be exposed and run down by public ridicule.

The judge is constrained to act justly. He must act righteously, or encounter infamy and daily discomfiture from

the opposition of juries to his opinions. Hence the general impartiality and high reputation of our judges. The Turkish mollahs or cadis are said to yield readily to corruption. Let it be supposed that, when a cause is called, a committee of the surrounding mob were at the same instant called out by lot, and the cadi or judge, after hearing the cause, compelled to convince this committee that the decree pronounced by him is just ; it is evident that he would immediately, or from necessity, become a just judge.

Our system is one of law, and not one of caprice. It is correct in that it provides that disputes shall be decided, not by ignorant men, but by the aid of judges learned in the law. Were ordinary persons taken by dozens, by lot, from the mass of mankind, to decide causes without the direction of judges, the country would be without law. Every different jury would have a different opinion concerning the rules of business. In other words, no man would know how to act, because justice would be administered according to no fixed or recorded principles. All the speculations of those men who propose to establish local or popular tribunals, to decide without appeal, are the result of mere ignorance. Civilization cannot make progress unless the principles be fixed and certain according to which transactions are to be regulated, and principles can only be recorded and adhered to by men who make the study of them the chief business of their lives.

Trial by jury always has been popular with the people, and in spite of all that has been said against it of late years, and in spite of its gross abuse in many instances, it has not only held its ground, but the people have placed it beyond the law-making authority to tamper with it, by embedding it in the constitution of each state. And Judge Cooley, in an able article published in the December number of the *American Law Register*, entitled, "Some New Aspects of the Right of Trial by Jury," calls attention to the fact that, in several of the states, the legislature has gone beyond the constitution in giving importance to the jury by diminishing the functions of the judge ; taking from him entirely the right of assisting and guiding the action of the jury in sift-

ing and weighing evidence, which was an important part of his duty at the common law. The judge is required in these states to confine his charge strictly to a written presentation of the law, and is inhibited from commenting on the facts. This is the case in Missouri. Judge Cooley says: "It does not seem to have occurred to any one to raise the question whether, in preserving the historical right of jury trial, the constitution has not guaranteed the functions of the judge, as well as those of the jury; and whether it was admissible to change the system radically in one particular more than another. * * * It is surely a matter of some importance to know whether the judge may be made a cipher in this time-honored tribunal, and whether the agreement of twelve men in a certain conclusion on the facts, however accomplished, is all the constitution aims at." This whole article is well worthy the careful consideration of every lawyer.

While we deprecate encroachment upon, or diminution of, the functions of the judge, rightly understood, as they existed at the common law, we are firm believers in the system of trial by jury in both criminal and civil cases. That it might be modified in some particulars so as to increase its efficiency without in the least impairing the system, we also believe. But it is not the purpose of this paper to discuss this matter. We believe the system the best yet devised by man for the administration of justice. Taking all things into consideration, it is, as a rule, the best for suitors, the best for the people, the best for judges, and for the profession of the law. Much weight is to be given to the deliberate judgment of a great, brave, thoughtful, intelligent, and progressive people in favor of this system, which they have long tried, which has become more popular the more intelligent and great they have become, which they have found efficient in the administration of justice, and which they declare to be the *palladium* of their liberties. It is only eminent and exalted nations that can thus believe in trial by jury. Where the mental capacity of a nation is mean, or the standard of public morality low, and the obligation of an oath is lightly felt, no worse a system could be devised.

For protecting the innocent, the jury system is most effect-

ual. It is very rare that an innocent man is convicted. To say such a catastrophe never happens would be to deny recorded facts. But, before it can happen, the accused has many opportunities to prove himself not guilty. The examining and committing magistrate, the grand jury and petit jury, and the presiding judge must all, in different degrees, have concurred in the result. And this is not all, for the court of appeals, to which the convicted may appeal, stands ready to correct any error that may have been committed in the steps leading to the conviction.

But it cannot with equal truth be asserted, as pointed out by Mr. Forsyth, that juries never acquit in ordinary cases where they ought to condemn. "This is, no doubt, the vulnerable point of the system: that feelings of compassion for the prisoner, or of repugnance to the punishment which the law awards, are sometimes allowed to overpower their sense of duty. They usurp, in such cases, the prerogative of mercy, forgetting that they have sworn to give a true verdict according to the evidence. But it is an error at which humanity need not blush; it springs from one of the purest instincts of our nature, and is a symptom of kindliness of heart which, as a national characteristic, is an honor."

That our judges in this country and England are held in higher estimation and honor than in other countries is due, in great part, to the jury system. In deciding upon facts, opinions will necessarily vary, and judges, like other men, are liable to be mistaken in estimating the effect of evidence. Every one thinks himself competent to express an opinion on a mere question of fact, and would not hesitate to comment freely and with acrimony upon the decision of a judge which, on such a question, happened to be at variance with his own. The judge would incur much odium, and lose much respect, if, in the opinion of the public, he had decided wrong on a matter of fact about which they believed themselves as well able to determine as himself. This kind of attack is now saved him by the intervention of the jury. He merely expounds the law and declares its sentence, and in the performance of this duty, if he does not always escape

criticism, he very seldom incurs censure. And it may be said that the tendency of judicial habits is to foster an astuteness which is often unfavorable to the decision of a question upon its merits. No mind feels the force of technicalities so strongly as that of a lawyer. It is the mystery of his craft, which he has taken much pains to learn, and which he is seldom averse to exercise. The jury acts as a constant check upon, and corrective of, that narrow subtlety to which professional lawyers are so prone, and subjects the rules of rigid technicality to be construed by a vigorous common sense.

And De Tocqueville is right when he says, in substance, that the jury, which seems to restrict the rights of the judiciary, does, in reality, consolidate its power; and in no country are the judges so powerful as where the people share their privileges. It is especially by means of the jury, in civil causes, that the American magistrates imbue the lower classes of society with the spirit of their profession. Thus the jury, which is the most energetic means of making the people rule, is also the most efficacious means of teaching it how to rule well.

The members of the legal profession ought to be the last to denounce the jury system, or to wish to see it in any way impaired. They, more than any other profession or class of men, have been the leaders and rulers of the people of this country. They have been enabled to do this by their influence upon the minds of men; and the most abundant source of their authority has been, and is, the civil jury. Through this medium they are in constant intercourse with the people; and, to their honor be it said, they have, in that intercourse, so impressed the people with their ability, culture, honor, integrity, and fitness to rule, that they have willingly chosen them as their law-makers and rulers.

Of the abuses of the jury system we have not space to speak. Every good citizen is interested in exposing and crushing them. The *Globe-Democrat* of this city for once deserves well of this whole community for the thorough and fearless manner in which it has made known to the people

the abuses of trial by jury in this city. If the other great daily journals of the country would, in a like manner, point out these abuses, and demand their immediate correction, it would be but a short time before they would be entirely reformed. If error, abuse, and wrong have crept into the system, the true remedy is, not to abolish it, but to vigorously go about abolishing the error, abuse, and wrong.

IV. BOOK REVIEWS.

THE AMERICAN DECISIONS: Containing all the Cases of General Value and Authority Decided in the Courts of the several States, from the Earliest Issue of the State Reports to the year 1869. Compiled and Annotated by JOHN PROFFATT, LL. B., Author of "A Treatise on Jury Trial," etc. San Francisco: A. L. Bancroft & Co. 1878. Vol. I, pp. xxvi, 740.

The editor proposes to "include in this series of reports all the cases of any general value and authority, from the earliest reported decisions of any of our state courts up to the year 1869, after which period the ground is covered by the series known as 'The American Reports.'" We are also informed that "it is not thought desirable to include the Federal decisions, of which a revision is being published." The latter statement will certainly be a matter of news to the profession, who will curiously ask, "What revision? under what auspices? and, by whom?"

In the prefatory statement from which we are quoting we are informed that "a special feature of these reports, and one which, it is hoped, will be found of much advantage, are [*sic*] the notes affixed to the cases." Mr. Proffatt promises he "will endeavor to bestow great care and research in these notes. All fanciful or digressive discussions will be avoided, the great aim being to make them pointed, compact, and practical; to give, in the first place, by reference, either to text-books or subsequent decisions, some idea of the value of a case as authority—how far it is adapted or modified in the particular state where the decision is made, and how far it agrees with the current of authority elsewhere. In this way a system of comparative legal principles will be evolved. In some few instances a note may be extended into an essay, wherein an effort will be made to give an exhaustive review of the authorities, both English and American, on the question decided." "An instance of a note of this kind," continues Mr. Proffatt, "will be found in the first volume, affixed to a decision in Pennsylvania, in the case of *Graham v. Bickham*, on the subject of liquidated dam-

ages. It will be found that there are upwards of one hundred cases reviewed or cited in this note."

Mr. Proffatt further tell us that "the arrangement of the cases is made with a view of showing a connected, regular order of adjudication in each state. Thus, the reports of a state for a certain period are taken, and cases are selected in order from them; then the reports of another state are examined for the same period of time, and cases selected in the same manner; and in this way until a volume is compiled. In the selection of cases for the succeeding volume, the cases are taken up at the point where they were left in the preceding volume. * * * In this manner each volume will cover a certain period of time, and the decisions from the reports of each state can be traced in continuous order through the series."

Such is the plan furnished of this work; and, "from an estimate made" by its projector, "it is calculated approximately that the revision of the reports carried out on the plan here proposed, omitting mere practice reports, will take about seventy-five volumes of this series."

It is obvious that, if this plan is carried out according to these promises, "there need be little said to show the immense advantage and convenience of these volumes to the active members of the profession who are not able to purchase the entire volumes of the state reports, or who have no facilities or opportunity for research in law libraries." And it must also be conceded that, when these promises shall have been fulfilled, "a lawyer who is provided with his own state reports, and who has, besides, the volumes of this series, supplemented with the series known as the 'American Reports,' may well be considered as equipped for the ordinary needs of his practice."

The prospectus of a work of such magnitude, accompanied with the first volume of it, is calculated to arrest at once the attention of the profession; and the great interest which it will excite is likely to provoke two enquiries: 1. Is the plan thus determined upon the best that could have been devised? 2. Is it likely to be faithfully carried out, and within a reasonable length of time?

We feel constrained to express the opinion that the projectors of this work have not devised the best plan for the accomplishing of a work which, properly planned and executed, might be so fruitful of beneficial results to the profession. We go further; we assert a conviction that this is not a *plan* at all, but that it is a mere *expedient*, dictated by the necessity of doing the work piecemeal. A

plan would have involved a preliminary survey of the entire field, a careful selection of all the cases to be embraced in the entire series, and the making of an entire concordance of American case and statute-law. Thus prepared, the editor could have affixed to every paragraph of the syllabus of every case a list of all other cases affirming, following, overruling, denying, doubting, or qualifying the point therein expressed, and of all repealing statutes. With a work of this kind, embodying a sufficient number of the best cases, arranged according to topics, with complete references to all other decisions on the same questions, the practitioner would indeed "be equipped for the ordinary needs of his practice." But how is it likely to be on the plan proposed by Mr. Proffatt?

First, what guaranty does an announcement of this plan afford the profession that he has made a survey of his work sufficiently thorough to enable him to judge with soundness what cases to include in his series and what to leave out? They know that, on the plan proposed, he can do no more than embrace in this series one-twentieth of the reported American case-law, from the beginning of such reporting down to the year 1869. Has he done anything, or suggested anything, that would indicate that he is qualified, either by years, or experience, or preparation, for the most difficult and delicate task of culling so little, and yet so much, wheat from such a wilderness of chaff? How can he undertake to say, without having first made an examination of the entire field, what cases are, and what are not, "of established general authority, * * * endorsed by subsequent decisions, or cited by text-book writers?" How can he, without such preliminary preparation, safely promise that he will not leave out many such cases, and that he will not leave out some that are of more value than these he puts in?

Again, how can one mind shoulder the task of annotating in the thorough manner proposed by Mr. Proffatt—so as "to give * * * by a reference, either to text-books or to subsequent decisions, some idea of the value of a case as authority—how far it is adopted or modified in the particular state where the decision is made, and how far it agrees with the current of authorities elsewhere," evolving in this way "a system of comparative legal principles?" There are now extant about 2,200 volumes of American state reports, and each volume contains, on an average, more than 100 cases; and, hence, to do the amount of "evolving" which this task will require, it will be necessary for Mr. Proffatt to read, partially or completely, between 100,000 and 200,000 cases,

or else to trust to the imperfect digests or text-books which cover but partially the different titles of the law. Working upon either plan, if he works faithfully, he will not see the end of his task until he is as old as Sir William Blackstone would have been could he have lived to read the volume before us.

Let us look at this more closely. There are 215 cases reported in this volume. Omitting brief references, ninety of these cases have notes appended to them, varying in length from a few lines to several pages. Thus it is seen that about four-ninths of the cases are annotated. The aggregate of these notes in this volume is, by printer's measurement, 175,000 ems of brevier, equivalent to about 250,000 ems of small pica; so that these notes would make about 100 pages of text of the ordinary American law-books. Now, it is given out that this series will embrace about 15,000 cases. If Mr. Proffatt annotates all these cases as thoroughly as he has annotated these in this volume (and we shall subsequently show that he must annotate *more* thoroughly, in order to show how far each case annotated "agrees with the current of authorities elsewhere"), it will be necessary for him to write about 6,500 notes, embracing about 5,850 pages similar in size and type to the ordinary American law treatise, and covering almost every department of the law. In other words, in addition to the vast work of making the selections of cases, of re-writing head-notes, of condensing statements of fact, of verifying citations, and of revising proofs, he must do an amount of original writing equivalent to the writing of eight ordinary law volumes. But this does not by any means cap the climax. The key-stone is added to the towering arch of this *Château d'Espagne* by the announcement of the publishers that it is expected to complete this work at the rate of from six to twelve volumes a year!

The space at our disposal obliges us to limit this notice chiefly to the plan of the work and to the probabilities of its being successfully carried out; and we cannot, therefore, speak much with reference to its execution, except to point out defects which spring almost inevitably from a defective plan. How can a man, beginning with the earliest cases to build up such a work, and proceeding with his task piecemeal, avoid making many mistakes unless he knows *all the law*? Now, although Mr. Proffatt hoists the addition of "LL. B." with as much seeming pride as an admiral flies his pennant, it does not follow from this that there is not some law which he does not know; for this degree is conferred by many

American colleges as the reward of from nine to twelve months' study of elementary legal treatises. We must not, therefore, be surprised to find that Mr. Proffatt has included in this volume some cases which are no longer the law in some of the states, while he has failed, in his notes, to inform us of this important fact. We have space to note but a few instances. The first case in the book, *Hanlon v. Thayer*, Quincy, 99 (1765), holds that a wife's articles of apparel and ornament, owned by her before marriage, except necessary wearing apparel, are liable to attachment for the debts of her husband. But Mr. Proffatt fails to inform us that this rule has been abolished by statute in several states, either by declaring that a husband's interest in his wife's property shall not be liable to be seized for his debts,¹ or else by declaring that whatever property the wife brings into the marital partnership shall remain her own.² He also prints *Miller v. Lynde*, 2 Root, 444 (1796), which holds that an action brought by a citizen of one state against a citizen of the same state, jointly with citizens of another state, is not removable (by the non-resident citizens) to the circuit court of the United States; but he fails to remind us that this case arose under the judiciary act, and that, under the act of 1875, the contrary rule has been declared.³ Again, he prints, on p. 246, *Respublica v. Oswald*, 1 Dallas, 319 (1788), which holds that it is a contempt of court

¹ Mo. Rev. Stat. 1855, ch. 63, sec. 1; *White v. Dorris*, 35 Mo. 187; *Cunningham v. Gray*, 20 Mo. 170; *Tally v. Thompson*, 20 Mo. 277; *Hockaday v. Sallee*, 26 Mo. 219; *Schneider v. Staihr*, 20 Mo. 271; *Harvey v. Wickham*, 23 Mo. 117; *Boyce v. Cayce*, 17 Mo. 47; *Barbee v. Wimer*, 27 Mo. 140; *Pawley v. Vogel*, 42 Mo. 291. This statute has been followed by one still more sweeping: *Laws of Mo. 1875*, p. 61. See, also, *Gen. Stats. Conn.* (ed. of 1875), p. 456, sec. 11. Nor did the diligence of Mr. Proffatt discover that the rule of this old Massachusetts case has been repealed by statute, even in Massachusetts: *Mass. Stats. 1857*, ch. 24; *Chapman v. Williams*, 13 Gray, 416.

² *Code of Ala. 1876*, sec. 2705; *Ark. Dig. Stats. 1874*, sec. 4193; *Civil Code of Cal.*, secs. 162, 171; *Gen. Laws Col. 1877*, sec. 1747; *Code of Ga. 1873*, sec. 1754; *Code of Iowa, 1873*, sec. 2203; *Dassler's Kan. Stats. 1876*, sec. 2705; *Civil Code of La., Fuqua, Art. 2314*; *Rev. Stats. Me. 1874*, p. 491, secs. 1, 2; *Compiled Laws Mich. 1871*, p. 1477, sec. 25; *Stats. at Large, Minn.*, 1873, p. 702, sec. 47; *Gen. Stats. N. H.* p. 337, sec. 1; *Rev. Stats. N. J. 1874*, p. 468, sec. 1; 4 *Stats. at Large, N. Y.* (2d ed.), p. 513, sec. 1; *Bright. Purd. Dig. (Penn.)* p. 1005, sec. 13; *Gen. Stats. R. I. 1872*, p. 329, sec. 1; *Rev. Stats. S. C. 1873*, p. 482, sec. 1; *Pasc. Dig. Laws of Texas* (2d ed.), Art. 4641.

³ *Girardey v. Moore*, 5 C. L. J. 78.

to publish remarks in a newspaper which have a tendency to prejudice the public with respect to the merits of a cause depending in court, and to corrupt the administration of justice. To this Mr. Proffatt adds the following note: "This case was cited and approved in a similar case, in *The People v. Wilson*, 64 Ill. 195; *s. c.*, 16 Am. Rep. 528, where it was held that the publication of an article in a newspaper in a place remote from that where the court is being held, concerning a cause pending in court, and which has a tendency either to prejudice the public, to corrupt the administration of justice, to influence the court by a threat of 'popular clamor,' or to reflect on the tribunal, the parties, the jurors, the witnesses, and the counsel, is a contempt of court, and punishable as such by a process of attachment." But he fails to tell us that this doctrine of constructive contempts was abolished by the statute, as to Federal courts, as early as 1831,⁴ and that many of the states have in like manner abolished it.⁵ Nor can we commend the discrimination which (p. 211) prints *The State v. Wells, Cox*, 424 (1790), laying down, among other things, the rule as to homicide in self-defence, but which neither points nor even alludes to the earliest American case on the same subject, which intimates that in such cases the violent character of the deceased may be shown—although reported in a volume from which he has made extracts for this volume.⁶

These observations are not made in a fault-finding spirit. They are merely designed to point out what the writer conceives the insuperable difficulty of completing a work of this magnitude on the plan proposed. It would be very unjust to Mr. Proffatt not to say that his head-notes are very apt and terse, and that his annotations—although, through the fault of his plan, necessarily imperfect—exhibit good judgment and great industry, and promise to be very useful to the practitioner. In fact, we do not see how, working

⁴ Rev. Stat. U. S., sec. 725.

⁵ This repeal of the old rule is embodied, either by an express declaration or by necessary exclusion, in the following statutes: Code of Ala. 1876, secs. 542-544; Ark. Dig. Stats. 1874, sec. 818; Code Civil Proc. Cal., sec. 1209; Rev. Stats. Conn. 1875, p. 61, sec. 15; Code of Ga. 1873, sec. 4711; 2 Rev. Stats. Ind. 1876, p. 8, sec. 13; Code of Iowa, 1873, secs. 3491, 3492; Gen. Stats. Ky. 1873, p. 357, sec. 4; Compiled Laws Mich. 1857, sec. 4074; 2 Stats. at Large, Minn., 1873, p. 939, sec. 1; 1 Wag. Mo. Stats., p. 423, sec. 35; Gen. Stats. Oregon, sec. 640; 1 Bright. Purd. Dig. (Penn.), p. 273, sec. 4; 2 Tenn. Stats. 1871, sec. 4106; Code of Va. 1873, p. 1204, sec. 27; 2 Stats. Wis. 1871, pp. 1737, 1738; 2 N. Y. Stats. at Large, p. 288, sec. 10.

⁶ *Robertson v. The State*, Addison, 246 (1794).

upon this piecemeal plan, he could have done so well, and we are candid in saying that, if he gets out his subsequent volumes at the rate of one a month, or one every two months, we do not expect him to keep them quite up to the standard of this one. No person familiar with law-book making can fail to see that this volume contains, at the lowest estimate, six months' consecutive work, well put in. If Mr. Proffatt's publishers can afford to allow him to proceed with his task with reasonable leisure, he will probably be able to complete it in forty years, in the necessarily imperfect manner in which he has commenced it.

Having said this much, we may be asked to suggest some plan on which a re-reporting of the American case-law can be successfully carried out. Our belief is that so vast an undertaking will require the concurrent labor of many experienced men, extending through a number of years. A much smaller task—the re-reporting of the English case-law as a preparation for codification—was recently proposed by Sir James Fitzjames Stephen; but the *Solicitors' Journal* expressed the opinion that it was too great an undertaking for private enterprise, and could only be carried out through the aid of a government subsidy. There are but two kinds of law in the United States, case-law and statute-law; there is, substantially, no customary law. These two bodies of law should be first *indexed*, so as to exhibit in the outline the entire body of the written American law as it existed in the different states *at a given date*, say on the first day of January, 1878. This index should exhibit, not only the existing law, but also the *repealed, overruled, obsolete, and modified* law. But we are stopped here, and told that such an index would be a *code*. This is a mistake. There can never be an American code while our complex system of government exists; because we are divided into some forty sovereignties; each of these sovereignties has its distinct system of laws; and you can no more make a single code out of so many distinct systems than you can make a code of European law. Nor would what we suggest be even a *digest* of American law. It would be just what we have called it, an index—a consolidated index in skeleton, in outline merely—to our different systems of law. The survey necessary to the completing of this index would enable the experienced men in charge of the several departments to determine what cases to reprint and what to reject. The remaining editorial work would be easy. From each paragraph of the syllabus of each case there should be dropped an index, necessarily in small type, showing: 1. In what states

the rule expressed has been changed by statute. 2. Referring to every case directly in point, and to none others—whether affirming, overruling, doubting, denying, or modifying the doctrine stated. Should these notes be found too numerous to be printed in the position indicated, they might be made to follow the text of each case. We doubt the expediency of writing “notes,” “exhaustive” or otherwise, upon the various questions of law decided in the cases thus reported. The reporting of the principal cases upon the different questions decided in the numerous reports of American case-law, arranged according to subjects and subdivisions, as in a digest, would, together with the index described, constitute a fair statement of the existing law, as far as it has been decided or enacted. If the means at the command of the publishers, or the time at the command of the editors, should permit the extending of these indices into copious notes, it would be still better. But, without this, the work would be monumental.

S. D. T.

THE LAW OF FRAUD, AND THE PROCEDURE PERTAINING TO THE REDRESS THEREOF. By MELVILLE M. BIGELOW, Author of “The Law of Estoppel,” etc. Boston: Little, Brown, & Company. 1877.

Mr. Bigelow treats the subject of fraud in a manner refreshing for its novelty. He arranges what he has to say on this subject in two leading divisions: first, of the substantive law of fraud, or those rules pertaining to its essence; and, second, of the adjective law of fraud, or those rules pertaining to the ramifications of the subject, or its complications with other branches of the law, including practice, and which are thus, as it were, “thrown at” the principal topic. This is a more analytic method than has been heretofore pursued with this subject; and the text-writer who adopts it avails himself of the greatest facilities for a thorough investigation of this branch of the law. Thus Mr. Bigelow, while occupying a broader field than Mr. Hovenden, who confined himself mainly to the dealings of courts of equity with frauds, has at the same time, by his analytic method, compressed his treatise into less space than that required by Mr. Hovenden in his purely synthetic treatment of the subject. Mr. Kerr’s shorter, and therefore less satisfactory, treatise followed a modified plan, partly analytic and partly synthetic. In this respect it was hailed as an

improvement on Mr. Hovenden's bulky work ; but it must now lose favor in view of the more artistic plan of the book before us. Mr. Bigelow is to be congratulated on what has, in other columns, been styled his " independent and original " labor in the production of this volume.

The style of the author is vigorous and clear, and his arrangement into his text of the principles he has deduced from the very numerous authorities he has examined evinces a conscientious discharge of the duties to which he has committed himself ; so that his work is not only a decided improvement upon its predecessors in respect of its plan, but it will be found of greater value and use to the profession by reason of its accuracy. Yet this accuracy must be measured by certain limits which the author has, either consciously or unconsciously, prescribed to himself. To these limitations, by which we find the present treatise confined, we must call the attention of the profession.

We do not now refer to the author's restriction of his labors to the civil law of fraud, excluding all that pertains to criminal jurisprudence ; for the dealings of the latter with fraud may well be relegated to a separate volume, or assigned to some other author, should such be Mr. Bigelow's preference. Nor is it a matter of importance (except with the qualifications hereafter suggested) whether he does or does not attempt to treat of all the law pertaining to statutory frauds upon third parties. But, when this branch of the law is excluded from the text of the work, we do not see the practical use of printing the various state statutes, or nearly all of them, on the subject of frauds against creditors and purchasers ; especially as there are extensive works by other writers devoted to the particular topic of fraudulent conveyances. In like manner the author's query, " What shall be said of a treatise on the law of fraud which makes no mention of *Chandelor v. Lopus* ? " may well be dismissed as a question of taste ; for a text-writer need not, unless for special purposes, discuss the origin and growth of the principles of law or practice historically ; and Mr. Kerr had set the example of disregarding that ancient case.

But if the question were, " What shall be said of a treatise on the law of frauds which makes no mention of *Robinson v. Elliott* ? " it must receive a different treatment. We regret to find our author ignoring, either from unwillingness or inability to recognize it as fraud, the existence of a very prevalent style of old-fashioned,

common-law fraud. The inability of many judges to see, or to apprehend, the existence of many varieties of fraud has been often remarked by lawyers who have had occasion to practise before them. There are text-writers whose legal vision is subject to similar limitations. To such the long line of American cases, from *Lang v. Lee*, 3 Rand. 410, through *Ranlett v. Blodgett*, 17 N. H. 298; *Edgell v. Hart*, 9 N. Y. 213; *Collins v. Myers*, 16 Ohio, 547; *Davis v. Ransom*, 18 Ill. 396, and *Lodge v. Samuels*, 50 Mo. 204, and countless other similar cases, down to *Robinson v. Elliott*, 22 Wall. 513, have little or no effect on the general law of fraud, because they are mistakenly supposed to derive all their pertinence, as well as all their authority, from the statutes relating to frauds committed on creditors and purchasers. It is evident that Mr. Bigelow has carefully excluded from consideration all cases of the class above referred to, as belonging exclusively to the domain of statutory frauds. In this he may be entirely consistent with Massachusetts traditions; for we believe it is considered in that staid commonwealth quite the correct thing to regard all cases that can in any way be referred to the statutes of 13th Elizabeth as exhibiting only statutory frauds—notwithstanding the great weight of American authority, including the courts of several of the Bay State's near neighbors, has declared the vicious conveyances referred to, in cases of which *Robinson v. Elliott* is an example, to be essentially fraudulent; and notwithstanding it has been held from the earliest period in England that the statute of 13th Elizabeth, and earlier statutes concerning fraudulent conveyances, were but declaratory of common-law principles. So, when our author, in his preface as in the body of his text, expresses his satisfied opinion that the law of such cases depends upon the statutes of each state and the peculiar adjudications thereunder, and that there is no common law governing all such cases, we imagine he is writing mainly for Massachusetts readers, and confining the usefulness of his treatise to the boundaries of his own state. Mr. Kerr's less elaborate work is preferable in this respect. That author, following Lord Hardwicke's somewhat tentative division of fraud into four great classes, devoted a large part of his treatise to the fourth class in that division, of "fraud collected and inferred from the matter and circumstances of the transaction as being an imposition on other persons not parties to the transaction." While he referred, under this title, to certain frauds that are purely statutory, yet not only does this author, but so does Mr. May also,

in his English work on Fraudulent Conveyances, make frequent reference to the doctrine that the statutes as to frauds on creditors were originally but declaratory of the common law.

In another feature of his work we find Mr. Bigelow confusing to his readers, if not slightly confused in his own mind. This is as to the classification of frauds into fraud in law and fraud in fact; and also as to a supposed identity of fraud in law with mere presumptive or constructive fraud. Thus he says in his introduction: "Constructive or presumptive fraud is an inference of law, not to the effect that an actual fraud has, in the absence of explanation, been clearly proved, but either that, judging men as very fallible beings and likely to yield to strong temptation, it is *probable* that fraud was committed; or, that the existence of certain things in the relation or conduct of parties begets a probability of actual knowledge of fraud, or what will lead to fraud, on the part of the person complained of. In the latter case the presumption may be conclusive, and thus preclude the party from showing that the inference of fraud is false; as in certain cases of constructive notice. But the fraud thus fixed is presumptive only, and in reality may not have existed." This is a correct statement of the nature of legal presumptions, and in it the author—nearly achieves perspicuity. He might with propriety have embodied the statement in the principal text of his work. Presumptive fraud must always be merely presumptive. The presumption may be conclusive, or it may be merely disputable. But in the latter case, up to the time the presumption has been successfully disputed, as in all other instances of presumption, the attitude of the law toward the question is simply one assumed for convenience; and the *fact* of fraud or no fraud is immaterial to the enquiry. In our author's language, above quoted, the fraud "in reality may not have existed."

Coming now to the question of *fraud in law*, we find Mr. Bigelow saying, at page 468: "In some cases fraud is *self-evident*; and, when so, it is the proper province of the court to *adjudge upon it*, without submitting its existence to the decision of the jury." Again, on page 474: "Fraud in law differs from fraud in fact in that, when certain *indicia* are established, *its presence is determined by the court as matter of law*, regardless of the existence of any evil intent on the part of the person engaged in it; whereas, fraud in fact depends upon the fraudulent intent of the party, and the facts establishing such intent are for the jury."

These statements are not only correct, but quite perspicuous.

It is plain to those who have closely investigated the subject that the self-evident fraud here spoken of differs radically from presumptive fraud. In *Robinson v. Elliott*, for instance, the Supreme Court of the United States did not indulge in presumptions; there was no necessity for resorting to presumptions, for the fraud there exposed was self-evident from the facts of the case, and the court reaches a positive *legal conclusion* rather than a conclusive presumption. As the doctrine was stated by Lord Ellenborough, in *Doe dem. Otley v. Manning*, 9 East, 64, and by Chief Justice Kent in *Sturtevant v. Ballard*, 9 Johns. 342, "fraud * * * is *the judgment of the law* on facts and intents."

How confusing, then, is Mr. Bigelow's statement at the commencement of his introduction: "The substantive law of fraud is divided into two branches, actual and constructive, or presumptive, fraud. Actual fraud is fraud in fact, involving turpitude; constructive, or presumptive, fraud is fraud in law." Fraud in law is by far too broad, as the author's more correct definition has shown us, to be measured by the same limits as presumptive fraud. That which is self-evident can by no means be identical with that which is only presumed to exist, but which may never have existed in fact. Strictly speaking, it is impossible to reduce the terms employed in one of these classifications of fraud into the terms pertaining to the other classification.

The excellencies of Mr. Bigelow's method of treatment of this subject are thus limited by his defective apprehension of the substantial characteristics of that subject. The most perfect analysis into the substantive and adjective features of the subject would fail of highest success if not preceded or accompanied by a clear, comprehensive, and accurate understanding of the nature and inherent qualities of those substantive features. With all the advance made by this treatise upon the results accomplished by its predecessors, we regret to be obliged to say that a complete treatise on the subject of Fraud remains yet to be written.

AMERICAN CRIMINAL REPORTS. A Series Designed to Contain the Latest and Most Important Criminal Cases Determined in the Federal and State Courts in the United States, as well as Selected Cases, Important to American Lawyers, from the English, Irish, Scotch, and Canadian Law Reports, with Notes and References. By JOHN G. HAWLEY, late Prosecuting Attorney at Detroit. Vol. I. Chicago: Callaghan & Co. 1878.

This is a good book of its kind. Good judgment has been used in selecting the cases which go to make up the volume. Care, taste, practical good sense, and research have been bestowed upon the notes of the editor herein contained. These notes are important, not only from an historical and critical point of view, but because they actually illustrate the cases to which they are appended, and are of practical utility to every criminal lawyer who is called upon to assist in administering the criminal law.

The expediency of attempting to classify the reported cases according to the various divisions of the law to which they belong has been often suggested, and, in some directions, to a slight degree has been attempted. This classification of criminal cases has been attempted heretofore in this country, though not with very satisfactory results until N. St. John Green, Esq., began a series of Criminal Law Reports, the first volume of which was published by Messrs. Hurd & Houghton, in 1874; this was followed by another volume, compiled by the same author and published by the same house. These volumes, we believe, received the approbation of the profession throughout the country. They are edited with a high order of skill and ability. But this series of reports, it is to be regretted, has been arrested by the death of Mr. Green. We suppose it is the intention of the editor and publishers of the present volume to take up the work where Mr. Green left it, and continue it upon mainly the same plan with which that work was begun and prosecuted. Such a work is needed, and will undoubtedly receive the patronage of lawyers.

In our estimation it is no slight praise of the volume before us to be able to say of it that it is worthy, in all respects, to succeed the volumes of Mr. Greene.

We cannot stop to notice the many points of interest which the cases here reported contain. But one thing, in particular, has arrested our attention, and that is the determination with which courts are arraying themselves against unjust and unwarranted comments and arguments of counsel for the prosecution in addressing the jury.

In the case of *Ferguson v. The State*, p. 582, the appellant was indicted and tried in the court below for murder in the first degree, and was convicted of murder in the second degree, and sentenced to the penitentiary for life. A bill of exceptions shows the following facts, which were also assigned as a cause for a new trial: "During the progress of the argument of counsel, counsel for the

state commented on the frequent occurrence of murder in the community, and the formation of vigilance committees and mobs, and that the same was 'caused by' the laxity of the administration of the laws, and stating to the jury that they should make an example of the defendant. And the defendant, by his counsel, asked the court to restrain the counsel, and objected to said comments, *because there was no evidence of such matters before the jury*; but the court overruled said motion, and remarked, in the hearing and presence of the jury, that such matters were proper to be commented upon, to which the defendant, at the proper time, excepted, and still excepts."

The court (supreme court of Indiana, 49 Ind. 33), in deciding the point thus raised, say: "The comments and arguments of counsel, and the remarks of the court during a trial, may be within the discretion of the judge presiding, but it is a judicial discretion, and, if improperly used to the injury of either party, it may, and ought to be, revised and controlled by this court. If it was proper to present these to, and comment upon them before, the jury, it was proper for the jury to consider them in making up their verdict. These things were outside of the record and the evidence, and were calculated to prejudice the rights of the defendant. It was tantamount to saying to the jury: Murders have been committed, vigilance committees formed, and mobs assembled in this country, and you may take these things into consideration in making your verdict; and, as you have got a chance now, you may make an example of defendant. The jury may have come to a different conclusion from what they would if the court had quietly rebuked the counsel, and told him to keep his argument within the facts and evidence in the case. The action of the court was an error, for which, if for no other cause, the judgment must be reversed."

So, in the case of *The State v. Smith*, p. 580 (75 N. C. 306), it is held to be error for the court to allow a prosecuting officer to use this language in addressing the jury: "The defendant was such a scoundrel that he was compelled to move his trial from Jones county to a county where he was not known." And it was also held error, in the same case, for the court to allow the prosecuting officer to use this language in addressing the jury: "The bold and brazen-faced rascal had the impudence to write me a note yesterday, begging me not to prosecute him, and threatening me if I did he would get the legislature to impeach me."

The publishers of this book are to be commended for the very credible manner in which they have performed their part in making this book acceptable. It speaks well for their enterprise and good taste; and it is to be hoped that it will meet with the approbation of the profession.

J. G. L.

THE LAW OF CONTRACTS. By JOHN WILLIAM SMITH, late of the Inner Temple, Author of "Leading Cases," "A Treatise on Mercantile Law," etc. Sixth American, from the Sixth London, Edition, by Vincent T. Thompson, of Lincoln's Inn; with References to English and American Decisions, by William Henry Rawle; and with Additional References to Recent American Cases, by George Sharswood. Philadelphia: T. & J. W. Johnson & Co. 1878.

So formidable an array of names upon a title-page may be taken as indicating the estimation in which, by the editorial mind at least, this work is held. And, indeed, the editorial work which has, from time to time, been bestowed upon its successive editions serves to emphasize the deserved favor in which the book has long been held by the profession on both sides of the Atlantic. For we do not hesitate to say that, among the purely elementary books of the law, Smith on Contracts occupies a very high rank. In a series of ten lectures, delivered originally before the Law Institute, in 1842, when, as appears by the preface to the sixth English edition, the author was only thirty-three years of age, we have presented, in compact form and under the most admirable arrangement, an epitome of the entire law of contracts in outline.

Designed, as these lectures were, for the use of students, they are necessarily confined to a discussion of the more general features of the existing law of contracts, without being burdened with a superfluity of detail. The leading idea of the author seems to have been the enunciation of definitions and general principles clearly and compactly, and then to fix them well in mind by sufficient illustrations and citations of authority to give them point and emphasis, without distracting the attention of the student with excessive citations. In this respect the book is sufficiently supplemented by the work of the different editors, whose notes afford more detailed discussions of the propositions of the text, illustrated by a somewhat wider range of authority, thus giving the whole an additional value to the practitioner as well as the student.

In his definitions the author is always clear and precise, and in their illustration both these qualities are well sustained. Especially is this true in his discussion of the topics of contracts by deed and simple contracts, and the distinguishing features of the two general classes are admirably presented. The distinction between patent and latent ambiguities, that *pons asinorum* to students in the law, is also worthy of special note; and we have nowhere seen this subject more clearly stated and illustrated than in the second lecture. The third and fourth lectures, devoted to the statute of frauds, are also deserving of especial notice, and are models of elementary work.

Of course, in a treatise of this nature there is little scope for originality, either in the structure of the work or in the author's method of treatment. An elementary book on contracts must necessarily be confined to the more general features of this branch of the law, embracing such topics as the statute of frauds, consideration, illegal contracts, fraud, parties to the contract, disabilities, agents, limitations, and construction of contracts; and this somewhat stereotyped outline has been, in the main, followed by the author. Little, if any, merit therefore attaches to the plan of the work, and its chief value lies in the compact and luminous manner in which the various topics are presented, so that the merest tyro in the law cannot fail in their comprehension. For purposes of instruction the book could hardly be improved. It cannot, of course, usurp in practice the place of more pretentious works like Chitty and Parsons, which give the practising lawyer citations to all cases; but, with equal fairness, it may be said that the more pretentious books cannot fill the place of such as this in any properly adjusted scheme of legal instruction.

The great need of the profession and of its schools is for just such works as this. Until a lawyer has attempted to give instruction in the law to beginners, he does not know how miserably deficient our libraries are in books which may properly be put into the hands of a student. The legal literature of the present generation of hard-worked lawyers is all in the direction of case-law, precedents, hand-books, and monographs upon practical topics. The elementary books of real excellence may almost be counted upon one's fingers. Among them may be named Williams on Real and on Personal Property, Stephen's Pleading, Bispham's Outlines of Equity, and Mitford's Equity Pleading. These may be

taken as samples of a class—unfortunately too small—of books adapted to the use of students. And it is not too high praise to say that Smith on Contracts has fairly earned its place in this class.

We had noted several points for comment in connection with the work of the American editors, but lack of space forbids their discussion. The editorial work is well and honestly done, and—a most commendable feature—the book is not over-edited.

THE PRINCIPLES AND PRACTICE OF COURTS OF JUSTICE IN ENGLAND AND THE UNITED STATES. By CONWAY ROBINSON. Vol. VII. Further, in Personal Actions, as to the Grounds and Form of Defence, and the Answer to that Defence. Richmond: Woodhouse & Parham, Randolph & English. 1874.

This volume, which would apparently contain about 800 pages, actually contains somewhat over 1,200, and is printed in the same style as the former volumes, which are familiar to the profession. Mr. Robinson may now be regarded as the Nestor of the American bar. Nothing less than the assiduity and unremitting labor of a lifetime of more than the average length would avail in the preparation of such a work as this, which, though modestly called a work on practice, includes a vast deal more than has ever been before included under the head of practice—including, indeed, almost everything relating to the grounds of actions and defences. It was mentioned long ago by one of the English judges that the title of the book was somewhat a misnomer, as not indicating the extensive scope of the work, which is really a treatise on the law of actions and defences, considered almost in their extremest limits. It may well be doubted whether there has ever been any law-book published, either in England or in this country, which displayed a more extensive and accurate knowledge of the law. The methods of Mr. Robinson are of a kind that are fast going out of use, as being unattainable amidst the vast accumulation of books of authority. They are the methods that were in use when he began the study of the law—the knowledge of the law as individualized in the cases in the reports, and not as generalized in text-books. Never again, perhaps, shall we behold such a profound and critical acquaintance with the decisions of England and America, such a familiarity with the sayings of the judges, which seem somehow to give a life to the law by showing the time, circumstances, and manner of its birth, growth, and development. High as is the praise

of Sir James Shaw Willes, when a judge of the court of common pleas, we know of nothing that can detract from its strict propriety and justice. Of the first volume he said: "I do not know which most to admire and wonder at, the extraordinary industry with which you have collected materials from sources so numerous and so widely scattered, even to the citation of authorities still damp from the English press; the luminous exhibition in so condensed a form of the leading principles of decisions, side by side with the most striking instances of their application, giving to a subject, generally treated so as to be repulsive, a scientific interest; or the singularly felicitous arrangement, giving the clue at once to every part of the subject and every point within its scope."

It is needless to say that the later volumes have not fallen below the high standard of the first, which has received and merited this high encomium. A very strange, or at least a very unusual, fate has overtaken the work. Before the publication of the later volumes the first had got out of print, and they so remain. The first four volumes have been selling for some years at very high prices—prices that placed them quite beyond the reach of most buyers—selling, we believe, when they could be had at all, at from \$20 to \$30 a volume. This is very unfortunate, for a book such as this should be in the hands of every lawyer. Indeed, if a lawyer had to confine himself to any one book, he could get along, probably, better with Robinson's Practice than with any other that has been published either lately or at any earlier time. We had hoped that the volumes that are now out of print would be reprinted, but the author does not give us any assurance that such will be the case. He says that copies of volumes V, VI, and VII can be had, and that they are in themselves a complete treatise on the law of defences in personal actions. This is doubtless true, but one might well wish to have the whole work, and many lawyers have expressed a wish of that kind, which could not be gratified. A part of the work may be very useful, but its very value will always awaken regret that it is incomplete. We do not know what inducements are offered for the reprinting of the first four volumes, but we should suppose that there would be a sufficient appreciation of a very unusually valuable and useful book to make it worth the while for the publishers to reproduce the lost volumes. We think it likely that the author sees more trouble in their reproduction than might be noted by another. Notwithstanding his extraordinary familiarity with the English cases, new and old, the fre-

quent citations; in the present volume, from the *SOUTHERN LAW REVIEW*, and other late publications of a like kind, show that the author keeps fully advised of the latest development of the law; from whence we may infer that, if he should make up his mind to reprint the missing volumes, he would not be content unless he should go over the whole matter again, so as to bring the text down to the present time. Whatever may be the upshot of this matter, we would advise all lawyers who know how properly to cherish a good thing to get all the volumes they can, and to trust for the rest to what the future may bring forth.

MAINE REPORTS. Vol. LXVI. Reports of Cases in Law and Equity Determined by the Supreme Judicial Court of Maine. By JOSIAH D. PULSIFER, Reporter to the State. Portland: Dresser, McLellan & Co. 1877.

This is a very handsome volume in appearance. The cases for each county are grouped together, and the year in which each case begun, together with the date of the decision, are given. A table of the cases reported (numbering 125), and of cases cited by the court, are given.

The work of the reporter seems to be well done, and little space is wasted, as the number of cases would indicate; but in one respect the volume is incomplete—in not having a proper index. The fashion of reprinting the paragraphs of the head-notes mixed into a sort of jumble, without suitable cross-references and badly classified, has taken such strong hold upon the manufacturers of volumes of reports that it would seem as if nothing short of a miracle will ever suffice to give to the over-worked or hurried lawyer an index upon which he can rely, to save him from the minute and laborious examination of each case which the present wretched system compels him to undergo before he can make use of the material the books contain. An instance of the consequences of this habit, from the volume before us, will illustrate our meaning. The two paragraphs of the head-note of *State v. Fleming*, p. 142, read as follows:

“An indictment found by a grand jury, drawn by virtue of *venires* not having the seal of the court upon them, is illegal and void; and the defect is one which cannot be cured by amendment or by special act of the legislature.

“In a criminal case a plea in abatement is sufficient if it is free from duplicity, and states a valid ground of defence to an indict-

ment in language sufficiently clear not to be misunderstood ; the strictest technical accuracy, such as is sometimes required in purely dilatory pleas in civil suits, will not be exacted."

It would naturally be supposed, perhaps, that the first paragraph would be reprinted, under the plan adopted, under the head of "Indictment," or "Void Indictment," or "Grand Jury," with cross-references to the titles named and to others involved, but the paragraph is found under the title "Jurors," without any cross-reference.

The second paragraph should have been, perhaps, under the title "Pleading," with cross-references to "Abatement," but it is placed under the last-named title, without cross-references. Other instances, equally awkward, might be cited. Not until reporters will take as much pains in the preparation of their indices as writers of text-books are obliged to do, will their work prove available and satisfactory to a long-suffering profession.

The formidable array of "Errata" for volume LXV, as well as for the present volume, indicate a carelessness on the part of the proof-reader which, in these days of perfect typography, ought never to be tolerated.

The volume contains, in an appendix, the proceedings of the Cumberland bar in memory of the lamented Chief Justice Shepley, and of the Penobscot bar in memory of the late Judge Kent.

C. A. C.

ELEMENTS OF THE LAWS; or, Outlines of the System of Civil and Criminal Laws in Force in the United States, and in the several States of the Union. Designed as a Text-Book and for General Use, and to enable any one to Acquire a Competent Knowledge of his Legal Rights and Privileges, in all the most Important Political and Business Relations of the Citizens of the Country; with the Principles upon which they are Founded, and the Means of Asserting and Maintaining them in Civil and Criminal Cases. By THOMAS L. SMITH, late one of the Judges of the Supreme Court of the State of Indiana. New and Revised Edition. Philadelphia: J. B. Lippincott & Co. 1878.

The foregoing is the somewhat crowded title-page of a neat duodecimo volume of 384 pages. The first edition appeared in 1853. The author and the present publishers obviously designed the work as a school text-book. Questions for use in the class-room are found at the bottom of each page. From the preface we read :

"Every intelligent person should understand the nature of the government under which he lives, and the primary principles of the laws relating to his personal rights and obligations." * * *

"It is true the law, like every other science, offers a wide field for investigation; but the acquisition of a knowledge of its elementary principles is not so difficult a task as has commonly been imagined, and may be attained as easily, and with as much facility, as a corresponding degree of proficiency in any other department of learning.

"This book has been prepared under the belief that a more concise exposition of the system of laws in the United States than any that has hitherto been offered would be useful and acceptable. It will serve to point out the proper lines of investigation to those who may desire to examine the subject treated of in their more minute details; and it will afford a general knowledge of the various branches of the law, sufficient, perhaps, for the ordinary purposes of persons who have not the leisure or inclination to master more voluminous works."

The book is divided into ninety chapters. The first four chapters treat of the origin of the laws, and of common, canon, and civil law; chapter five, of equity; chapter six, of written and statute law; chapters eight to twelve, of the form of government, etc., of the United States and of the several states. Then follow chapters relating to natural rights, real and personal property, administration, and contracts. Beginning with chapter thirty-nine, which treats of "The Means of Asserting and Enforcing Rights and Obligations," and ending with chapter seventy-two, entitled, "Of the Decrees in Chancery," the whole ground of State and Federal jurisdiction and civil procedure is gone over and succinctly stated. The remaining chapters are devoted to an equally comprehensive exposition of criminal law. A careful perusal of the work convinces us that it is most admirably adapted for use in colleges and academies, and the higher grades of our public schools. With the addition of an index, and references to authorities, it would be, we think, of great aid in law schools. A.

STEPHEN'S DIGEST OF THE LAW OF EVIDENCE: From the Third English Edition. With Notes and Additional Illustrations by JOHN WILDER MAY. Boston: Little, Brown, & Company. 1877.

This book has been a sensation in legal literature. It is a long stride in the direction of reform in law-book making. The author

has accomplished what, in these days of ponderous tomes, seemed impossible. He has made a clear, strong, accurate, and every way admirable statement of the law of evidence in the limits of a pocket volume, which itself might, perhaps, be lessened without detriment to its utility. The book is an important, permanent addition to the list of standard legal text-books.

This third edition has been carefully revised by the author in the light of the wide criticism to which it had been subjected. The results are as favorable as could be anticipated. Some statements have been corrected or modified, and ambiguities have been removed. There was good reason for a reprint of the edition on this side of the Atlantic, but we have searched in vain for any good reason for Mr. May's "Notes and Additional Illustrations." The only reason apparent is a probable desire to couple his name with a popular and valuable work. His notes do not add a penny to the value of the book; they only encumber it and add to its bulk and cost. The publishers, too, seem blind to the purpose of the author, and they have accordingly *stuffed* the book with matters useless and redundant. Four pages are occupied by a "List of Abbreviations." Blank spaces, and even entire pages, abound. Captions and headings are so spaced and printed in caps as to occupy the utmost possible room. The paper is thick and stiff. As it escapes from the hands of the annotator and publisher we have a book of some 285 pages, ugly to the eye and clumsy to the hand, which, if *let alone* by Mr. May, or treated with the spirit and purpose of the author, and published in the style and type of our best law-books, would have been a neat, handy volume of less than 200 pages, grateful to the eye of taste, and convenient for the hand and pocket. We have tried in vain, at least half-a-dozen times, to find some mitigation of the indignation which kindles when we take up this reprint, and to find some excuse for its existence. There is none. The editor and publishers have evidently conspired to swell the book and its cost at the expense of the bar and public, who must have it at any price and in any form. Our words will seem harsh only to those who have not seen the book criticised.

HUBBELL'S LEGAL DIRECTORY. For Lawyers and Business Men. Containing the Names of one or more of the Leading and Most Reliable Attorneys in nearly Three Thousand Towns and Cities of the United States and Canadas; a Synopsis of the Collection

Laws of each State, with Instructions for Taking Depositions, the Execution and Acknowledgment of Deeds, Wills, etc., and a Concise Synopsis of the Bankrupt Law, with Registers in Bankruptcy ; also, the Times of Holding Courts throughout the United States and Territories, for the year commencing October 1, 1877; to which is added a List of the Prominent Banks and Bankers throughout the United States. J. H. HUBBELL, Editor and Compiler. New York: J. H. Hubbell & Co. 1878.

The title of the work expresses so fully the scope of it that there is little left for the reviewer to say. We have in former notices commended the work, and take the occasion now to say that it is the best of this class of publications we have seen. There are a very considerable number of changes in the list of attorneys—enough to show that care is exercised in making up the list. The synopsis of collection laws, etc., appear to be well done.

THE NOTARY'S MANUAL: Showing the Rights, Duties, and Liabilities of Notaries, According to the Common Law, throughout the Union. Detroit: Richmond, Backus & Co. 1877.

This is a convenient manual for notaries, particularly those officiating in the state of Michigan. Its forms, though not numerous, seem to be correct. Its statements as to acknowledgments in the different states are supported by authorities. It is furnished with an index sufficiently full for all practical purposes.

V. NOTES.

THE case of Ramlohl Thackoorseydass v. Sooyumnul Dhonmull is cited in "Bishop on Contracts."

CORPORATIONS — "PERPETUAL SUCCESSION." — The St. Louis Court of Appeals has just decided a novel and important question in the law of corporations. In 1853 the legislature of Missouri granted a charter to certain persons, giving to them, their associates, and successors, "perpetual succession," by the name of the Masonic Hall Association. At that time the general laws of the state provided that, when no period of existence was limited in the charter of a corporation, it should exist for twenty years. The Masonic Hall Association incurred certain indebtedness in 1869, on which the holders brought suits against it in 1876, and obtained judgments. There were executions issued and *nulla bona* returns thereon. As there existed in Missouri a double liability of stockholders up to 1870, the judgment creditors, in accordance with local statutes, filed motions for executions against various stockholders for the amount of their stock. These motions were sustained by the lower courts. On appeal the cases turned upon the significance of the words "perpetual succession." If in a charter they signify perpetual duration, everlasting existence, immortality, then the judgment creditors were entitled to make these motions. If, as contended by the stockholders, these words only signify unbroken, continuous, uninterrupted succession during the life of the corporation, and are not a definition of its term of existence, then the general statutory limitation of twenty years applies, and the charter expired in 1873, three years before the suits were brought, and of course the judgments rendered against the late corporation were nullities. In an elaborate and able opinion, Judge Lewis rendered the decision of the whole court, sustaining the latter view. The action of the lower court was reversed, and the motions for executions, being founded on nullities, were dismissed.—Scanlan v. Crawshaw.

THE case of Johnson, Receiver, against Laffin, just decided by Judge Dillon, in the United States circuit court, at St. Louis, is important to stockholders in national and other banks and corporations. Laffin was a stockholder in the National Bank of the State of Missouri. The bank was in apparent good condition, and Laffin had no information that it was not so in fact, but he resolved to sell his stock, and for this purpose placed his certificate in the hands of a broker, after signing the usual blank power of attorney thereon to transfer the stock on the books of the bank. The broker took the certificate to James H. Britton, the then president of the bank, and affected a sale

to him, Britton giving his own individual check on the bank for the purchase-money. The broker then delivered the certificate to Britton, and gave Laffin his own check for the net proceeds. Laffin did not actually know to whom the stock had been sold, nor did the broker actually know at the time what follows. After receiving and paying for the certificate, Britton handed it to the book-keeper of the bank, telling him to credit his, Britton's, account with the stock, and to transfer it to him, as trustee, on the books. This was done. the book-keeper for the purpose inserting his own name in the blank power of attorney signed by Laffin. Of the books of the bank the stock-ledger alone showed that this stock was held by Britton as trustee of the bank. Elsewhere it stood, with other stock similarly bought (to the amount of nearly \$500,000), in the name of Britton, "trustee." After the failure of the bank and the appointment of a receiver, the latter brought a bill in equity to have the sale by Laffin set aside, for the recovery of the money paid, and that he be declared still a stockholder. As heavy assessments on all stockholders are anticipated to meet the bank liabilities, the case excited wide interest, especially among those who had, and who had not, sold their stock.

The receiver's counsel, Henderson & Shields, urged his right to recover on two grounds: *first*, that Laffin was affected with knowledge of the transaction as a stockholder—which Judge Dillon put aside as of no weight; and, *second*, that the sale was not complete till the transfer was made on the books of the bank, and that this transfer itself *imputed* knowledge of it to Laffin; and, further, that the insertion of the book-keeper's name in the blank power of attorney made the book-keeper the agent of Laffin to the extent that the book-keeper's knowledge became Laffin's knowledge, and bound him. In an elaborate review of the statute and the authorities, Judge Dillon held that where a stockholder in a national bank, in good faith, sells his stock to a party capable to contract, and apparently solvent (as Britton then was), and delivers his certificate, with the usual power of attorney thereon, to transfer, signed in blank, and receives payment, this *completes* and perfects the transfer, and his liability ceases from that date. Thereafter the seller or the buyer can compel the bank to register the transfer on its books, if desired by either. While the proposition relied on by the receiver's counsel is true, that a national bank cannot become a purchaser of its own stock, and all attempted purchases are *void*, yet, on the facts of this case, it was not Laffin, but Britton himself, who attempted to sell to the bank. Laffin sold to Britton, and the latter could not aver his own unlawful attempt to buy for the bank to defeat the sale to himself, as made by Laffin. The result is that the stock became Britton's stock, and he is liable to the bank for the money which he took from the bank with which to pay for this stock, and can himself be held liable thereon as a stockholder by the receiver.

The questions discussed are important, but do not seem difficult or doubtful in the clear light of this learned decision, and they are settled in accordance with the highest commercial good sense. The case will doubtless go to the supreme court, but only to be affirmed at the expense, to the remaining stockholders, of heavy costs and attorneys' fees.

VI. DIGEST OF RECENT CASES REPORTED IN AMERICAN LAW JOURNALS.

PREPARED BY S. OBERMEYER, ESQ., OF THE ST. LOUIS BAR.

[The purpose of this department of the REVIEW is to advise the profession of all the points decided in the latest reported cases of importance, and to show how complete reports of the same may be obtained. To this end a syllabus of each case is given, together with the name, date, and page of the journal where the case is reported.]

NAME.	ABBREVIATION.	ADDRESS.	PUBLISHED.	PRICE.
Albany Law Journal.	Alb. L. J.	Albany, N. Y.	Weekly.	15 cents.
American Law Record.	Am. L. Rec.	Cincinnati.	Monthly.	50 cents.
American Law Register.	Am. L. Reg.	Philadelphia, Pa.	Monthly.	50 cents.
American Law Review.	Am. L. Rev.	Boston, Mass.	Quarterly.	\$1 25
Central Law Journal.	C. L. J.	St. Louis, Mo.	Weekly.	25 cents.
Chicago Law Journal.	Ch. L. J.	Chicago.	Irregularly.	25 cents.
Chicago Legal News.	C. L. N.	Chicago, Ill.	Weekly.	10 cents.
Legal Reporter.	Leg. Rep.	Nashville, Tenn.	Monthly.	50 cents.
National Bankruptcy Register Reports. }	N. B. R.	New York.	Semi-monthly.	50 cents.
Reporter.	Rep.	Cambridge, Mass.	Weekly.	25 cents.
Southern Law Journal.	South. L. J.	Tuscaloosa, Ala.	Monthly.	\$1 00
Virginia Law Journal.	Va. L. J.	Richmond, Va.	Monthly.	50 cents.
Weekly Notes of Cases.	W. N. C.	Philadelphia, Pa.	Weekly.	20 cents.
Western Jurist.	West. Jur.	Des Moines, Ia.	Monthly.	50 cents.

ADMIRALTY.—Collision—Measure of damages.—1. A schooner, while at anchor, with the proper lights up, was run into and sunk by a steamship; *Held*, that the steamship was liable for the loss; 2. The measure of damage or value of the vessel is what price a prudent owner, wishing but not compelled to sell, would reasonably expect to get, within a reasonable time, at public or private sale, and using proper measures to avoid undue sacrifice.—*McCloskey v. Steamship Achilles et al.*, U. S. Cir. Ct., E. D. Pa., C. L. N., Nov. 24, p. 78.

—Distribution, priority of—Liens—Wages—Supplies.—On September 8, 1877, Casselberry filed a libel for supplies against the schooner; the court thereupon issued a writ of attachment which was duly returned "attached," etc.; Pending the writ, another libel was filed for supplies, and two for wages; These were libels for intervention; All of the libellants obtained decrees before the sale of the vessel, which was sold upon an order, at the application of the original libellant; The fund in court was not sufficient to pay all the decrees; *Held*, that, as between the original and intervening libellants, the former must prevail (the case of *The Triumph*, 2 Blatchf. 433, was followed); *Per* Cadwallader, J. "This case rests on very narrow grounds; The lien, as it is loosely called, for supplies is a peculiar one, dependent on the justice-seat or *forum*, and merely gives the plaintiff a right of seizure; When he has exercised this right, the court will not keep the case open for other claims of like nature, which may come in from all parts of the world, but must award the fund to the first suitor."—*The Schooner Pathfinder*, U. S. Dis. Ct., E. D. Pa., W. N. C., Jan. 8, p. 528.

—Judicial power under the constitution—Admiralty jurisdiction—Writ of prohibition—Contract for the use of a wharf a maritime contract—District court jurisdiction to enforce lien for.—1. That judicial power under the con-

stitution extends to all cases of admiralty and maritime jurisdiction; 2. That the jurisdiction of the district courts is not limited to the particular subjects over which the admiralty courts of the parent country exercised jurisdiction when our constitution was adopted; 3. That the jurisdiction of the admiralty courts of the parent country does not extend to all cases which would fall within such jurisdiction, according to the civil law and the practice and usages of Continental Europe; 4. That the nature and extent of the admiralty jurisdiction conferred by the constitution must be determined by the laws of Congress and the decisions of the Supreme Court of the United States, and by the usages prevailing in the courts of the states at the time the Federal constitution was adopted; 5. That power is vested in the Supreme Court of the United States to issue the writ of prohibition to the district court, when that court is proceeding in a case of admiralty and maritime cognizance of which it has no jurisdiction; but, where the district court is proceeding in a cause not of admiralty and maritime jurisdiction, the Supreme Court of the United States cannot issue the writ, nor can the writ be used except to prevent the doing of something about to be done, nor will it ever be issued for acts already completed; 6. That a contract for the use of a wharf by the master or owner of a vessel is a maritime contract, and, as such, is cognizable in the admiralty; that, such a contract being one made exclusively for the benefit of the vessel, a maritime lien in the case arises in favor of the proprietor of the wharf against the vessel for payment of reasonable and customary charges in that behalf for the use of the wharf; and that the same may be enforced by a proceeding *in rem* against the vessel, or by a suit *in personam* against the owner in the district court.—*Ex parte Easton et al.*, U. S. Sup. Ct., C. L. J., Nov. 30, p. 469; *s. c.*, C. L. N., Dec. 15, p. 97.

— Libel for breach of charter-party—Commencement of voyage.—Respondents had chartered a bark, then at Genoa, to sail from Philadelphia to a port in Great Britain, it being expressly stipulated that she should sail from Genoa during the month of December; On the 30th of December the vessel was all ready for departure, and was towed three-quarters of a mile from her anchorage to the western side of the harbor, opposite the roadway for departure, where she anchored again, presumably within the jurisdiction of the local authorities; On account of head-winds the bark was unavoidably detained until January 4, 1877, when she was taken out by a tug and proceeded on her voyage; Upon the arrival of the bark in Philadelphia, respondents refused to receive her; *Held*, that the vessel had sailed before the end of December, and decree for libellants.—*The Francesco Curro*, U. S. Dis. Ct., E. D. Pa., W. N. C., Nov. 15, p. 415.

— When a party may intervene and defend in an action *in rem*.—Waiver of lien for repairs.—1. To entitle a party to intervene and defend in admiralty in an action *in rem*, it must appear in the answer and claim that he has a proprietary interest in, or lien upon, the vessel seized; 2. The lien for repairs is not waived by the acceptance by the creditors of the negotiable note of the party from whom the repairs were made, unless such note was accepted as payment; 3. The assignment of the note so given does not carry with it the lien, and no suit can be maintained by the assignee, either in his own name or in the name of the payee of the note, to enforce such lien; 4. The maritime lien is personal, and becomes extinct when the creditor has parted with all his interest in the claim; 5. And the fact that the creditor had afterwards, as endorser, paid and taken up the note would not revive and enable him to enforce the lien.—*The R. W. Skellinger*, U. S. Dis. Ct., S. D. O., Am. L. Rec., December, p. 352.

ARBITRATION AND AWARD.—Setting aside award—Bias—Arbitrator—Counsel for party in a former action.—An attorney at law is not disqualified from acting as an arbitrator in a matter in which one of the parties had been his client in a former action.—*Goodrich v. Hulbert et al.*, Sup. Jud. Ct. Mass., Rep., Jan. 2, p. 17.

ASSIGNMENT.—Chose in action—Wages—Piece-work—Continued employment.

—A mere possibility, coupled with no interest, is not assignable, but wages to be paid under an employment may be assigned; There is no difference between a running contract at piece-work and any other continuous employment.—*Kane et al. v. Clough et al.*, Sup. Ct. Mich., Rep., Jan. 2, p. 17.

—Notice to debtor.—Payment by latter to assignor in possession.—The assignment of a judgment or other like chose in action, where the legal effect of the contract is not to vest the legal title in the assignee, can only be perfected as against the debtor or party bound to pay, or his creditors, by notice given to such debtor or party bound that such assignment has been made; This rule, however, does not apply where notes or other evidences of debt have been actually delivered; If the possession is not changed, and apparent ownership is still with the assignor, so that he is enabled to hold himself out as owner of the paper, and if the debtor pay in good faith to the assignor thus in possession, he will be protected.—*Fickey et al. v. Loney et al.*, Sup. Ct. Tenn., Am. L. Reg., Jan., p. 50.

ASSIGNMENTS.—Assignments for benefit of creditors, what sufficient to constitute—Acceptance by assignee not necessary—Right of assignee as against subsequent lien creditors.—A executed, acknowledged, and left for record a voluntary deed of general assignment for the benefit of creditors, without the knowledge of the assignee named therein; Subsequently, but before acceptance by the assignee, property of assignor was attached in the hands of garnishees; *Held* (reversing the judgment of the court below), that the attachment was nugatory, the beneficial interest in the property attached having passed under the assignment; *Per Sharswood, J.*: "The moment an assignment for the benefit of creditors is placed by the assignor, or any one interested, in the office of the recorder of deeds of the proper county, and within the prescribed time, the beneficial interest of the creditors, the *cestuis que trustent*, is certainly and completely vested, and it is totally immaterial when the assignee accepts the trust, or whether he ever accepts it at all;" An assignee for the benefit of creditors may assert his right as trustee, in any proceeding, to all property of the assignor which passed by the assignment, against all persons claiming by subsequent transfer, attachment, or other lien.—*First National Bank, etc., v. Holmes et al.*, garn., Mark's Appeal, Sup. Ct. Pa., W. N. C., Dec. 6, p. 449.

BAILMENTS.—Innkeeper—Liability for loss of property of guest.—Plaintiff, a guest at defendant's inn, retired without locking the door of his room; During the night his watch, money, and other property, which had been left upon a chest of drawers near the door, were stolen; By section 1 of 26 & 27 Vict. it is provided that no innkeeper shall be liable to make good any loss of property brought to his inn, except when such property shall have been "stolen, lost, or injured through the wilful act, neglect, or default of such innkeeper, or any servant in his employ;" Section 8 of said act requires the innkeeper to exhibit a copy of section 1 in a conspicuous part of the entrance to his inn; Defendant caused a notice, purporting to be a copy of section 1, to be placed in the entrance to his inn, but the word "act" was omitted; *Held* (1), that the innkeeper was not protected by the statute; (2) that the question of negligence was properly left to the jury.—*Spice v. Bacon*, High Ct. App. (Eng.), Alb. L. J., Dec. 1, p. 385.

BAILMENT.—*Locatio operis faciendi*—Evidence.—1. Where a railroad company, having a quantity of old and worn out railroad iron which it wished to utilize, entered into contract with a rolling mill company, by which the latter company was to re-roll into new bars or rails the old iron when delivered to it, and the rolling mill company was to add to the old iron a certain amount of new iron to form the head or top of the new rails, and thereafter, under said agreement, old iron was delivered to the rolling mill company by the railway company, and new rails were manufactured therefrom, with accessorial additions furnished by the rolling mill company, and the railway company supplied the chief or principal part of the materials for the new rails, the right of property to the iron while the work is going on, and to the rails when completed, remains in the railway company, and *held*, that the

transaction between the two companies is of the nature of the bailment denominated by law-writers of the class *locatio operis faciendi*; 2. In such a transaction as above stated, the material enquiry is which company furnishes the chief or principal portion of the material for the manufacture of the new rails, and where the old and new rails are levied upon in the possession of the rolling mill company, as the property of the latter company, and are afterwards replevied by the railway company, as its property, from the officers making such levy, and on the trial of such replevin action the president of the rolling mill company, introduced by the railway company to prove the process of the manufacture of the new rails, testifies in full as to such process, and states he is familiar with the details of the manufacture of the rails, *held*, that it is material error for the district court to refuse to said officers the right to show by such witness the amount of new iron intermingled with the old iron, in the process of manufacturing the old rails by the railway company into new ones.—*Arnott et al. v. Kansas Pacific R. R. Co.*, Sup. Ct. Kan., C. L. J., Dec. 21, p. 525.

BANKRUPTCY.—**Adjudication**—**Corporations**—When policy-holders are corporators—Adjudication by bankruptcy not allowed without giving them an opportunity to be heard.—A mutual life insurance company, in which the policy-holders were entitled to vote for trustees, and to share in the profits, was placed in the hands of a receiver under the state laws; Subsequently a trustee of the company filed a petition in bankruptcy in the name of the corporation, and it was adjudged bankrupt; The receiver applied to have the adjudication set aside; *Held* (1), that the receiver had a standing in court to make the motion; (2) that the question of the solvency of the company could not be examined on the motion; and (3) that policy-holders of the company were corporators within the meaning of sec. 122, ch. 6, title 61, of the U. S. Rev. Stat., and an adjudication in bankruptcy could not be made against the corporation without giving them an opportunity to be heard.—*In re Atlantic Mut. Life Ins. Co.*, U. S. Dis. Ct., N. D. N. Y., Alb. L. J., Dec. 22, p. 453.

—**Arrest.**—An adjudication of a bankrupt who was under arrest in a civil action at the time the proceedings were commenced does not entitle him to a release from such arrest.—*Brandon National Bank v. Hatch*, Sup. Ct. N. H., N. B. R., Dec. 1, p. 468.

—**Assignee**—**Election of will not be confirmed, when.**—Where the assignee chosen had been for several years the book-keeper of one of the bankrupts, and said bankrupt and his attorney endeavored to control the action of the meeting in electing him, and both voted for him on powers of attorney, confirmation was refused, although the election was almost unanimous, as it appeared that a large number of individual creditors of said bankrupt were not and could not, under the law, be represented at such meeting; The district judge is bound to see that the rights of the minority are protected, and to refuse confirmation where he has good reason to suspect the assignee has been chosen in the interests of the bankrupts, or if the circumstances are such as to indicate that the election was not a fair one.—*In re Wetmore & Bro.*, U. S. Dis. Ct., E. D. Mich., N. B. R., Dec. 1, p. 514.

—**Assignee**—**Estate in joint tenancy of husband and wife will not pass to assignee of either.**—**Effect of divorce after adjudication.**—In Indiana a conveyance of real estate to husband and wife creates an estate in joint tenancy; While such an estate exists, neither husband nor wife has any interest which can be sold on execution, or will pass to the assignee of either; If the effect of a divorce, procured subsequent to an adjudication in bankruptcy, is to destroy the unity of possession and turn the estate into a tenancy in common, it is simply the creation, by operation of law, of a new interest in the bankrupt, and is, to all intents and purposes, a new acquisition, which the assignee cannot claim; Whether a divorce will create such a change in the nature of the estate, *quære*.—*In re James Benson*, U. S. Dis. Ct., D. Ind., N. B. R., Nov. 1, p. 877.

- Assignee—His title to property of bankrupt subject to all legal claims existing before proceedings in bankruptcy.—The assignee takes the property of the bankrupt as an attaching creditor would take it, subject to all legal claims upon it; The bankrupt made a contract with S. & Co. to manufacture hides into leather for them, the hides to be purchased with the proceeds of drafts upon S. & Co.; The drafts were discounted at a bank, and the proceeds thereof placed to the credit of the bankrupt in his general account; The hides purchased were paid for by checks upon such account; *Held*, that the hides were purchased for S. & Co. and became their property; that it is not necessary that the agent should pay out the identical bank-notes he receives from his principal; Where some of the hides were purchased with the proceeds of drafts which S. & Co. refused to accept, their title to such hides is not affected by such fact, but they become debtors to the estate or to the bank advancing the money; The title to the leather, when completed, passes under the arrangement for the purchase of the hides.—*Safford et al. v. Burgess*, Assignee, U. S. Cir. Ct., D. Vt., N. B. R., Nov. 15, p. 402.
- Assignee—Power contained in a deed of trust and to be delegated to *cestuis que trust* will not pass to assignee, when.—Where a deed of trust given to secure a debt contains a provision that, on the failure of the trustee to act, the *cestuis que trust* may appoint a new one in his stead, the power thereby conveyed is a personal trust or confidence in the *cestuis que trust*, and will not pass to their assignees in bankruptcy.—*Clark et al. v. Wilson et al.*, Sup. Ct. Miss., N. B. R., Nov. 1, p. 356.
- Assignee—Proceeds of judgment rendered in favor of debtor, upon which his creditors have acquired a lien prior to bankruptcy proceedings, will not pass to assignee.—The bankrupt, nearly a year before the petition was filed, left for collection with his attorney a note signed by a third person, and subsequently drew several orders upon him, payable out of the proceeds thereof; *Held*, that the holders of the orders were entitled to payment out of such proceeds, in preference to the assignee.—*In re E. M. Smith*, U. S. Dis. Ct., D. Mass., N. B. R., Nov. 15, p. 399; *s. c.*, C. L. N., Dec. 1, p. 86.
- Assignee—Voting for, where separate adjudication of a partner.—Where a separate adjudication is made against a bankrupt who is, or has been, a member of a firm, the separate creditors have a right to vote for the assignee.—*In re F. A. Falkner*, U. S. Dis. Ct., D. Mass., N. B. R., Dec. 1, p. 503.
- Assignment for benefit of creditors is valid, when.—An assignment for the benefit of creditors, without preferences, made in good faith and with no fraudulent intent, is valid.—*Haas*, Assignee, etc., v. O'Brien, Ct. App. N. Y., N. B. R., Dec. 1, p. 508.
- Assignment for benefit of creditors—Superseded by proceedings in bankruptcy—Judgment and levy after such assignment may be good even as against assignee in bankruptcy subsequently appointed.—A general assignment for creditors, without giving priority, is superseded by proceedings in bankruptcy; Where, after a general assignment for creditors has been made, a judgment is recovered in the ordinary course of practice, and without collusion between the debtor and creditor for the purpose of giving priority, such judgment and the levy under it are good even as against an assignee in bankruptcy subsequently appointed.—*Dolson et al. v. Kerr*, Sup. Ct. N. Y., N. B. R., Nov. 15, p. 405.
- Attachment—Dissolved by proceedings in bankruptcy.—An attachment served more than four months prior to the commencement of proceedings in bankruptcy will be sustained as against the assignee, notwithstanding that within the four months the record in the attachment suit was amended by adding the name of another defendant, which had been omitted, he being a member of the firm against which the attachment proceeding had been instituted.—*Harrington*, Assignee, v. Fire Association, garn., U. S. Cir. Ct., E. D. Pa., W. N. C., Nov. 22, p. 432.

- Attachment—Dissolved, when.—An attachment of the property of a debtor on mesne process is *ipso facto* dissolved by a deed of assignment made in bankruptcy, if the proceedings in bankruptcy were commenced within four months after such attachment (Rev. Stat., sec. 5044; sec. 14, of original act); In such a case the assignee's right is superior to the right of the attaching creditor, although the attached property had been sold before the commencement of the bankruptcy proceedings, and the proceeds paid over to the creditor after the adjudication, but prior to the date of the deed of assignment. — *McCord et al. v. McNeal*, Assignee, U. S. Cir. Ct., W. D. Mo., Am. Law Reg., January, p. 52.
- Bankrupt—His *status* before appointment of assignee defined.—Until an assignee is appointed, the bankrupt is the trustee of his estate for the benefit of his creditors; If he is endorser upon notes or bills which mature before the appointment of an assignee, he may waive demand and notice: *Semble* that he may, even without leave of court, begin any suits which are necessary to save the statute of limitations, or are otherwise of immediate urgency, although he cannot, without suit, receive payment.—*Ex parte Tremont Nat. Bank*; *In re Battey*, U. S. Dis. Ct., D. Mass., N. B. R., Nov. 15, p. 397.
- Bankrupt—Suits brought by him and pending at time of adjudication.—A bankrupt may continue to prosecute an action pending at time of adjudication where the cause of action is one which does not pass to the assignee: Where the cause of action is one which passes to the assignee, he should be notified, and, in case of his refusal, the action must be dismissed; An order that a nonsuit be entered in case the assignee did not appear within a specified time, held to be erroneous.—*Towle v. Davenport*, Sup. Ct. N. H., N. B. R., Dec. 1, p. 478.
- Bankruptcy Act 1869, secs. 96, 97—Witness—Refusal to answer—Crimination.—A witness in bankruptcy, not the bankrupt himself, may, as every witness in other proceedings, decline to answer a question on the ground that his answer would tend to criminate him.—*In re Firth*; *Ex parte Schofield*, Ct. App., Ct. Bankruptcy (Eng.), Rep., Jan. 2, p. 8.
- Charges—Should be regulated by register—Privileged debts.—It is the duty of registers to examine and regulate the charges, whether any creditor objects or not; Where there are debts due workmen which are privileged, the assignee has no right to waste their money in litigation for the supposed benefit of their general creditors; If the general creditors agree, the assignee should pay the privileged debts as soon as he realizes enough money for that purpose.—*In re J. M. Sawyer*, U. S. Dis. Ct., D. Mass., N. B. R., Dec. 1, p. 460.
- Composition—Not barred on account of refusal of discharge under sec. 5110.—The mere fact that the bankrupt has been refused a discharge for a cause set forth in section 5110 is not an absolute bar to a composition; The district court is not deprived of jurisdiction to entertain proceedings for a composition by the fact that a petition to review an order refusing to discharge the bankrupt is pending in the circuit court; In such case the bankrupt should be required to pay the opposing creditor the expenses and disbursements, other than counsel fees, incurred in opposing the discharge, as a condition of, and prior to, the confirmation of the composition; A composition of 5 per cent. sustained where there appeared to be no assets of any value, and no probability of any dividend through an assignee, and the parties were acting in good faith.—*In re Odell et al.*, U. S. Dis. Ct., S. D. N. Y., N. B. R., Dec. 1, p. 501.
- Composition—Surety upon commercial paper not discharged by participation of holder thereof in composition proceedings of principal.—Where the holder of accommodation paper, knowing it to be such, enters into and signs a resolution of composition in proceedings in bankruptcy instituted against the endorser, the maker is not thereby discharged from his liability.—*Guild v. Butler*, Sup. Jud. Ct. Mass., N. B. R., Nov. 1, p. 347; *s. c.*, C. L. J., Nov. 16, p. 423; *s. c.*, Rep., Jan. 2, p. 15.

- **Creditor—Intervening.**—A general unsecured creditor is entitled to intervene and contest a petition in involuntary proceedings.—*In re Austin et al.*, U. S. Dis. Ct., E. D. Mich., N. B. R., Dec. 1, p. 518.
- **Creditor—May intervene and object to adjudication of bankruptcy in involuntary case where debtor makes default.**—Any creditor whose interests are directly affected by the proceedings may intervene and contest the allegations of the petition with regard to acts of bankruptcy, notwithstanding the debtor fails to appear on the return day.—*In re J. Jonas*, U. S. Dis. Ct., D. Cal., N. B. R., Dec. 1, p. 452.
- **Creditor—Privileged—Equitable assignment.**—A mere promise to pay out of a particular fund, when received, the promisor retaining control over the fund, and no notice being given to the person who is to pay it, does not work an equitable assignment.—*Ex parte Tremont Nail Co., Re Middleboro Shovel Co.*, U. S. Dis. Ct., D. Mass., N. B. R., Dec. 1, p. 448; *s. c.*, C. L. J., Dec. 7, p. 482.
- **Creditor—Secured—Mortgage—May be foreclosed in state court by leave of bankrupt court after creditor has proved his claim in latter court.**—A creditor of the bankrupt whose claim is secured by mortgage may, after having proved his claim in the bankruptcy proceeding, and upon leave of the bankrupt court, foreclose his mortgage in a state court, if the assignee does not object; As to the bankrupt and his wife, the bankruptcy proceedings do not divest the state court of jurisdiction of an action to foreclose a mortgage given by them.—*McHenry et al. v. La Société Française*, U. S. Sup. Ct., N. B. R., Nov. 15, p. 385; *s. c.*, Alb. L. J., Dec. 1, p. 398.
- **Discharge—Cannot be impeached collaterally—Debt created by fraud.**—A discharge cannot be impeached collaterally for fraud in preventing notice to creditors of the pendency of the proceedings, nor on the ground that the bankrupt, before the proceedings in bankruptcy were commenced, fraudulently removed his property out of the jurisdiction of the court in which an action against him was pending, with intent to defraud his creditors; A judgment against the bankrupt, existing at the time his petition is filed, whether founded upon contract or tort, is a provable debt; Where it is claimed that the collection of a judgment is not barred by a discharge in bankruptcy on the ground that such judgment is a debt created by fraud, the court will look back of the judgment, and, if it had its root and origin in fraud, the discharge will not bar it; A judgment recovered by a father for the seduction of his daughter, where there was no promise of marriage, and no arts or devices were practised to accomplish such seduction, is not a debt created by fraud within the meaning of the Bankrupt Act.—*Howland v. Carson*, Sup. Ct. Comm. Ohio, N. B. R., Nov. 1, p. 372.
- **Discharge—Computation of requisite percentage of assets in a voluntary case.**—Payments to judgment creditors who have secured their liens by execution levies are not to be deducted from the gross amount realized by the assignee before ascertaining whether there is the requisite per cent. of assets to entitle a voluntary bankrupt to a discharge; The term assets includes all property of every kind and nature, chargeable with the debts of the bankrupt, that comes into the hands of, and under the control of, the assignee; and the value thereof is not to be considered a less sum than that actually realized out of said property, and received by the assignee for it.—*In re Taggart*, U. S. Dis. Ct., N. D. N. Y., N. B. R., Nov. 1, p. 351.
- **Discharge—Must be pleaded by sureties on appeal bond from a justice.**—In Mississippi a judgment against the sureties on an appeal bond follows upon rendition of a judgment against the principal; Where sureties upon an appeal bond are discharged in bankruptcy pending such appeal, they must plead such discharge before judgment on the appeal if they desire to avail themselves of it as a defence.—*Jones et al. v. Coper et al.*, Sup. Ct. Miss., N. B. R., Nov. 1, p. 343.
- **Discharge—Staying execution upon a judgment against several defend-**

ants to abide the event of the discharge of one of the same in bankruptcy.—1. That it is a rule of practice in all actions on contracts that, if a recovery be had, it must be against all of the defendants, unless a defence is interposed, by one or more of the defendants, personal to themselves; Of this character are coverture, infancy, and bankruptcy; 2. That in cases where, under the law, a suit must be brought and a recovery had against all of the joint contractors, unless some have died or been discharged, a judgment in such cases may be rendered as against all, and an order made staying execution until the question of the bankrupt's discharge is determined.—*Byers v. First Nat. Bank*, Sup. Ct. Ill., C. L. N., Dec. 22, p. 108.

— Exemptions—Are not to be claimed out of partnership assets.—Where there has been an adjudication in bankruptcy against a mercantile partnership, and the assets of the firm turned over to the assignees, the individual partners are not entitled to claim as exempt, under sub. 9, sec. 80, ch. 34, Rev. Stat. of Wisconsin, each the sum of \$200 out of the partnership stock.—*In re Hughes et al.*, U. S. Dis. Ct., W. D. Wis., N. B. R., Dec. 1, p. 464.

— Factor and principal—Case in which that relation was claimed but not allowed.—Where one party agrees to furnish goods to another at a fixed price, the latter to pay all freight, storage, and charges, and to pay at the end of every three months for the goods sold by him within that time, and to pay at the end of the year for all goods remaining unsold, the proceeds of the goods sold by the latter cannot be recovered from his assignee in bankruptcy; Such arrangement does not create the relation of principal and agent or factor, but that of buyer and seller.—*In re Linforth & Co.*; *Ex parte The Furst, etc.*, Mfg. Co., U. S. Dis. Ct., D. Cal., N. B. R., Dec. 1, p. 485.

— False pretences—Obtaining goods by—Indictment under sec. 5132, Rev. Stat. U. S.—An indictment under sec. 5132, Rev. Stat. U. S., will lie before an order of adjudication in bankruptcy; An indictment for obtaining goods under false pretences, founded upon the ninth clause of sec. 5132, need not charge an intent to defraud creditors generally; Such an indictment need not contain the negative averment that the accused was in fact not carrying on business and dealing in the regular course of trade when he obtained credit for goods on false pretences. *United States v. Myers*, U. S. Dis. Ct. E. D. Va., N. B. R., Nov. 15, p. 387.

— Homestead—Fraudulent appropriation of assets by bankrupt towards securing a homestead.—Where a certain sum is allowed by statute to be invested in a homestead, such sum may be put into an undivided part interest in a homestead, and into premises to which others hold the legal title; An insolvent, more than four months before the commencement of proceedings in bankruptcy against him, furnished from his own property, towards buying a homestead upon premises which his wife had contracted to purchase, and which were subsequently conveyed to her, the sum of \$1,400; *Held*, that such transaction was a fraud upon his creditors, and that the assignee was entitled to a conveyance of the husband's interest in such homestead, less the amount he was authorized by law to invest in a homestead, and also to a conveyance of the balance of his interest for the benefit of creditors existing at the time of the investment. *Johnson, Assignee, v. May et al.*, U. S. Ct. Vt., N. B. R., Nov. 15, p. 425.

— Jurisdiction—Appellate jurisdiction of the circuit court over the action of the district court—The second section of the original bankrupt law, Rev. Stat. U. S., sec. 4986, construed.—A having become a bankrupt, and a provisional assignee having been appointed, on his application to the district court he was directed to receive bids for the property of the bankrupt; and he accordingly received a bid from B, on July 2, 1875, for certain property of the bankrupt, for which B agreed to pay the sum of \$40,000; An order nisi was thereupon entered by the district court, requiring all parties to show cause why that bid should not be received, and, on July 9th following, the same was confirmed to B; On July 12th following, on application of the assignee

to the district court, this order of confirmation was set aside, and another bid was received and confirmed to other parties, on an advance in the price, \$40,500, and the sale was confirmed to them, and the money paid, and the property turned over to the new purchaser; It is these sales and confirmations made by the district court that are the subject of controversy in this case; And the point is whether or not there is provision otherwise made than in sec. 2 of the Bankrupt Law for the appellate jurisdiction of the circuit court over the action of the district court; *Held*, that there is not; that this is simply a sale of the property of the bankrupt, which cannot stand as the act of the court, and the property of the bankrupt pass to the purchaser; and that the order of the district court rescinding the order of confirmation and confirming a sale to other parties was wrong and could not stand; 2. That this order of the district court was not such a decree or judgment as is provided for in the eighth section of the original Bankrupt Law, which gives an appeal or writ of error; and that the statute gives the circuit court superintendence and jurisdiction over such cases.—*Crane et al. v. Conro et al.*, U. S. Cir. Ct., N. D. Ill., Ch. L. J., vol. 1, No. 3, p. 151.

— Jurisdiction—State courts have no right to enjoin assignee from collecting the assets of the bankrupt.—A state court has no jurisdiction of an action brought against a trustee (or assignee) in bankruptcy to enjoin the collection of the assets of the bankrupt; The assignee holds the assets as an officer of the court which appointed him, and his possession and management thereof cannot be interfered with by the state courts; Although the assignee may prosecute or defend a suit pending at the time of adjudication, he is not compelled to resort to the state court before which it was pending, but may apply directly to the Federal courts.—*Southern et al. v. Fisher*, Sup. Ct. S. C., N. B. R., Nov. 15, p. 414.

— Lien—Enforcement of, on eve of bankruptcy.—Where one has a valid lien upon property in his custody belonging to another who is on the eve of bankruptcy, and sells the same with the knowledge that bankruptcy is imminent, the sale will not be afterwards disturbed by the court in bankruptcy if untainted by fraud, and if there has been no sacrifice of the property; The lien of a factor for his advancements, charges, and commissions is within the meaning of the amendment to sec. 5128, Rev. Stat. U. S., which provides that nothing in that section shall be construed to invalidate securities taken in good faith upon the making of a loan, and will be protected in bankruptcy.—*In re Roseberry et al.*, U. S. Dis. Ct., D. Ind., N. B. R., Nov. 1, p. 340.

— Lien—Proof of debt—Sale of property subject to lien.—Where a suit against the bankrupt to enforce a lien is pending at the time of adjudication, the lien creditor may, before any final disposition of such suit, prove his demand in the bankrupt court, and have it allowed as a lien claim, with all the rights and privileges belonging to it under the Bankrupt Law; Where property has, by order of the bankrupt court, been sold subject to a lien, the assignee's deed providing that such lien is to remain in full force, the purchaser is estopped to deny the validity of such lien; Where the bankrupt court has adjudged a claim to be a lien upon property of the bankrupt, it has jurisdiction of an action to enforce such lien against third parties who have purchased said property subject to the lien at a sale by the assignee.—*Buckman v. Dunn et al.*, U. S. Dis. Ct., D. Me., N. B. R., Dec. 1, p. 470.

— Petition of partner praying for an adjudication against his firm dismissed as a fraud on the Bankrupt Act.—The bankruptcy court has full equitable powers over a proceeding in bankruptcy, and, where it clearly appears to have been instituted for purposes foreign to the legitimate object of the act, it will be summarily dismissed; A partner will not be allowed to put his firm, whose affairs were settled years ago, into bankruptcy on an allegation that it is insolvent by reason of petitioner's own fraud in effecting a composition with its creditors; Where it appears that a petitioning partner has obtained, without consideration, assignments to his father of a large number of the

pretended claims against his firm, *held*, that this conduct, under the circumstances of the case, is a fraud on the Bankrupt Law.—*In re Hamlin Hale Co.*, U. S. Dis. Ct., N. D. Ill., N. B. R., Dec. 1, p. 522.

— Petition in involuntary case—Act of bankruptcy—Vacating adjudication as having been fraudulently procured by bankrupts.—Where the requisite number of creditors join in a petition against a firm, it is not necessary that they should all be creditors of the firm; The taking of partnership property when the firm is insolvent, to pay a debt not a debt of the firm, although each of the partners may be liable for it, is an act of bankruptcy; Where the requisite number of creditors have signed the petition, an adjudication will not be set aside on the ground that such petition was procured by the bankrupts as an involuntary one to avoid the necessity of procuring the assent of the necessary number of creditors in case of a deficiency of assets; There can be no legal fraud in procuring an adjudication on involuntary proceedings unless it should be followed by a discharge that could not be had on voluntary proceedings; An adjudication by default can only be opened at the instance of a party to the default.—*In re E. L. Matot & Co.*, U. S. Dis. Ct., D. Vt., N. B. R., Dec. 1, p. 485.

— Petition—Defective—May be amended.—Petition in bankruptcy defective in not setting out the special authority of the president of a bank who is one of the petitioning creditors, to sign and verify the same on behalf of the bank, his general authority as an officer not being sufficient; The petition alleges that the creditors joining in the petition constitute one-fourth in number of all the creditors whose provable debts amount to \$250; In setting out the names and amounts of each, however, it appears that the debts of several of them are less than that sum. *Held*, on a motion to dismiss the petition, that the same is insufficient and demurrable in this respect; That the court has jurisdiction to allow an amendment to remedy the defect.—*In re Roche et al. v. Fox*, U. S. Dis. Ct., W. D. Wis., N. B. R., Dec. 1, p. 461.

— Preference — Attempt to gain without receiving, not within Bankrupt Act.—The taking of a bill of sale of logs purchased with money furnished by the creditor is not a preference unless it appears that such bill of sale included more than the creditor was entitled to; An intent to gain a preference accompanied by acts to accomplish it, but which entirely fail, so that no preference is received, does not come within the provisions of the Bankrupt Act which impose penalties upon creditors who knowingly receive a preference; All transactions to prefer a *bona fide* creditor come within the six months' clause of sec. 5128; the six months' clause applies to other creditors; An effort to secure an honest debt from a failing creditor is not an act of fraud within the meaning of sec. 5021.—*In re The Bousfield, etc.*, Co., U. S. Dis. Ct., D. Ohio, N. B. R., Dec. 1, p. 489.

— Preference—Prior adjudication of preference conclusive in another proceeding to prove claim.—A prior adjudication is always available against the defeated party when made in a competent jurisdiction, and upon a controversy actually decided in that adjudication; Where, in a proceeding to distribute a particular fund, the court adjudges that securities held by certain creditors are preferential, and decrees that such creditors be barred from participating in such distribution, such adjudication is conclusive upon the creditors specified.—*In re Leland v. Platt, Assignee; Libby v. Platt, Assignee*, U. S. Cir. Ct., S. D. N. Y., N. B. R., Dec. 1, p. 505.

— Preference—Reasonable cause to believe debtor insolvent.—When the condition of a debtor's affairs is known to be such that prudent business men would conclude that he cannot meet his obligations as they mature in the usual course of business, there is reasonable cause to believe him insolvent; Where a private banker obtains an advance from a bank on his check on New York, and on the following day delivers securities to the bank, stating at the time that he has reason to fear his check will not be met, *held*, that the securities were transferred with intent to give a preference, and that

the bank had reasonable cause to believe him insolvent.—*Merchants' Nat. Bank v. Cook et al.*, U. S. Sup. Ct., N. B. R., Nov. 15, p. 891; *s. c.*, C. L. N., Dec. 1, p. 82.

— Preference—Suffering property to be seized on execution—Reasonable cause to believe debtor insolvent—Lien.—An insolvent debtor, who was a trader, gave to a creditor new notes, payable on demand, signed by himself alone, to take up others of the same amount, secured by the signature and endorsement of other responsible parties, and purchased goods of persons who were ignorant of his insolvency, in order that such goods might be taken on execution on judgments recovered on such notes; *Held*, that he thereby procured, or at least suffered his property to be seized on, execution within the meaning of sec. 5128 of the Rev. Stat., if seizure there was; Where the agent of the creditor had reasonable cause at the time to believe the debtor was insolvent, and knew that the transaction was in fraud of the Bankrupt Law, it is the same as if the creditor had himself taken part therein with the same cause to believe and the same knowledge; A levy which has been relinquished before the filing of a petition in bankruptcy creates no lien upon the property as against the assignee.—*Sage, jr., v. Wynkoop, Assignee*, U. S. Dis. Ct., N. D. N. Y., N. B. R., Nov. 1, p. 863.

— Proof of debt—By former partners of bankrupt.—A former partner or a joint covenantor with the bankrupt, who is liable for joint debts and pays them, may prove the amount against the assets of his former partners or co-contractors; A claim by retired partners for unliquidated damages, by reason of their liability under the provision of a lease to the firm that, in case of failure to perform, the lessors may reënter and relet the premises at the risk of the lessees, who should remain liable for the rent and be credited with the sums actually realized, cannot be proved against the estate of their former partners.—*Ex parte F. J. Lake*; *In re Whiting, McKenna & Co.*, U. S. Dis. Ct., D. Mass., N. B. R., Dec. 1, p. 498.

— Proof of debt—Holder of a bill or note may prove in full against maker, although former has received part or all of it from a surety.—The holder of a note or bill may prove it in full against the party primarily liable upon it, notwithstanding he may have received a part or all of it from a surety or *quasi-surety*; C., a manufacturer, consigned goods to his factors, who advanced their notes to an amount much beyond what was ultimately realized on the goods; both parties failed, and the factors, employing the goods then in their possession, made a composition of 40 per cent. with their creditors, including the holders of the notes, who reserved the right to prove in full against all other parties to them. *Held*, that these creditors, proving against C., need not give credit for the full amount received by them on the composition, but must abate their proof by giving credit for the property of C. so employed by the factors; Where notes were exchanged, and the holder has received a payment from the maker, he can only prove for the balance against the endorser; Debts are to be considered proved when they are duly authenticated and sent to the assignee or register.—*Ex parte Harris et al.*; *In re Cochrane, jr.*, U. S. Dis. Ct., D. Mass., N. B. R., Nov. 15, p. 482.

— Proof of debt—Partnership—Separate estate of partner.—Where all the members of one firm are partners in another firm, they cannot prove its debt against the latter; Where a bank has discounted drafts drawn by the former firm upon one who is a partner with the members of such firm in the latter firm, it cannot prove its claim thereon against the joint estate, but must look to the separate estate of the drawee.—*In re Savage et al.*, U. S. Dis. Ct., N. D. N. Y., N. B. R., Nov. 1, p. 868.

— Proof of debt—Protest and notice.—Where a firm which has endorsed a note of one of the partners becomes bankrupt before the maturity of such note, protest and notice to the firm of its dishonor is not necessary in order to prove it against the joint assets.—*Ex parte A. W. Russell*; *In re J. F. Paul & Son*, U. S. Dis. Ct., D. Mass., N. B. R., Dec. 1, p. 476.

- Sale of assets—Inadequacy of price realized.—A sale of stock to a creditor who holds it as collateral security for \$10 per share, when it is worth \$25, will be set aside for inadequacy of price, and a resale ordered.—*In re Bousfield & Pool*, U. S. Dis. Ct., N. D. Ohio, N. B. R., Dec. 1, p. 481.
- Schedule—Sufficient statement by debtor of debt—Composition—Withdrawal of creditor—Enjoining execution.—Where a judgment debt has been insufficiently stated by the bankrupt, by reason of omitting the costs, though the creditor may have proved his debt, and have attended the meetings at which a composition was duly passed and confirmed, the creditor may withdraw his proof, and proceed on his execution; An injunction to restrain him therein will not be granted.—*In re Lang*; *Ex parte Lang*, Ct. App. Ct. Bankruptcy, Rep. Jan. 9, p. 62.
- Set-off—Deposits of bankrupt in a bank may be held as security for his indebtedness to the bank.—Upon the bankruptcy of a depositor, his deposit becomes a security for the payment of his indebtedness to the bank; Such deposit should be set off against the aggregate debt to the bank, not including any notes upon which the bankrupt is surety, unless the principals are insolvent; a bankrupt in a composition case in which no assignee has been appointed stands in the position of an assignee in respect to set-off; *Semble*, that if the bank holds mere contingent debts or liabilities, or a claim for unliquidated damages arising upon contract, it may retain the deposit until the amount of his provable debt can be ascertained, and may then use it as a set-off.—*Ex parte Howard Nat. Bank*; *In re North & Co.*, U. S. Dis. Ct., D. Mass., N. B. R., Nov. 15, p. 420.

BANKS AND BANKING.—Authority of cashier to bind bank as an accommodation endorser.—The cashier of a bank is not presumed to have power, by reason of his official position, to bind the bank as an accommodation endorser of his own promissory note, and actual authority to make such endorsement must be shown before a recovery can be had thereon.—*West St. Louis Sav. Bank v. Parmelee, etc.*, Bank, U. S. Sup. Ct., Alb. L. J., Dec. 29, p. 473; *s. c.*, Rep., Jan. 9, 83.

- Power and authority of cashier—Endorsement of paper by him—When bank bound—Officers may borrow money of the bank.—*Held*, 1. That the note payable to "McMann, cashier," was a note payable to the bank; 2. That McMann, as cashier, had authority to assign the note; The court states at some length the power and authority of bank cashiers; 3. That, McMann being the cashier of the defendant bank, the presumption is that the note payable to him in the form above stated was the property of the bank; and, if the cashier endorsed it as such and sent it to the savings bank in an official letter for discount, it would be the same thing as requiring the savings bank to discount it on behalf of the defendant bank; and, if the savings bank discounted such note and sent the proceeds to the defendant, that was a transaction within the scope of the duties of the cashier, and for which the bank is liable; and it does not make any difference what the defendant did with the money thus received; 4. That the president, cashier, or director of a national bank may borrow money of the bank; 5. The fact that paper has not been authorized by a discounting committee to be discounted does not in any way affect outside parties who are *bona fide* endorseees of the paper before maturity; 6. That a cashier has no authority to endorse accommodation paper, not passing through his bank in its line of usual business, so as to bind his bank to the endorsee.—*Blair v. First Nat. Bank, etc.*, U. S. Cir. Ct., N. D. Ohio, C. L. N., Dec. 1, p. 84; *s. c.*, Rep., Jan. 9, p. 40.

BILLS AND NOTES.—Promissory note—Fraud—Unauthorized use of accommodation endorsement—Evidence—Admissibility of parol evidence to contradict effect of endorsement.—Where an endorser is prevailed upon by plaintiff's agent to endorse certain renewal notes payable to plaintiff, upon a promise that the endorser should not be held liable upon any of the notes; that the only reason for asking his endorsement was that plaintiff desired to have two-name paper, *held*, that endorser might show by parol evidence the nature

of the circumstances under which the endorsement was written.—*First Nat. Bank, etc., v. Cleaver et al.*, U. S. Cir. Ct., E. D. Pa., W. N. C., Dec. 13, p. 480.

— Promissory note—Negotiability—Collection-fee clause destroys negotiability.—A clause in a promissory note allowing a commission upon its face as a collection fee in case of non-payment at maturity renders the note uncertain, and destroys its negotiability.—*Woods v. North*, 4 W. N. 241, followed; *Nicholson v. Discount, etc., Bank, Sup. Ct., Pa.*, W. N. C., Nov. 29, p. 441.

— Validity of note for an injury magnified.—Where a promissory note was given by a mother for an injury to the plaintiff by her son, and one of the defences was that the plaintiff falsely and fraudulently exaggerated the extent of the injuries received, and the presiding justice instructed the jury "that the mere magnifying of the injuries would not of itself defeat the note, but if the defendant falsely, fraudulently, deliberately, misrepresented as to the extent of his injury, and as to the magnitude of his claim, it would discharge the defendant." *held*, on exceptions, that the instruction correctly stated the law.—*Thompson v. Hinds*, Sup. Ct. Maine, Rep., Jan. 2, p. 14.

BONDS, MUNICIPAL.—Constitutional provision—Two-thirds of the qualified voters.—The act authorizes subscriptions by townships whenever two-thirds of the qualified voters of the township, voting at an election called for that purpose, shall vote in favor of the subscription, while the constitution prohibits such subscription unless "two-thirds of the qualified voters of the town, at a regular or special election to be held therein, shall assent thereto;" *Held*, that the act is constitutional; The opinions of the supreme court of Missouri are followed, and so much of the opinion of this court in *Harshman v. Bates County* as holds the act unconstitutional is overruled.—*County of Cass v. Johnson*, U. S. Sup. Ct., C. L. N., Dec. 1, p. 81; *s. c.*, C. L. J., Dec. 14, p. 506; *s. c.*, Alb. L. J., Dec. 15, p. 438.

— Funding county debt.—Under an act authorizing counties to fund any and all debts they may owe, the county court had power to issue "county funding bonds" to protect the faith and preserve the credit of the county. *County of Cass v. Shore*, U. S. Sup. Ct., C. L. N., Dec. 1, p. 83.

CONSTITUTIONAL LAW.—Act of legislature impairing the obligation of a contract as to taxation of a railroad.—A statute of a state which declares that all charters of corporations granted after its passage may be altered, amended, or repealed by the legislature does not necessarily apply to supplements to a charter already passed, though the supplement be subsequent to the statute; Nor does a provision in a supplement to the charter which says that "this supplement, and the charter to which it is a supplement, may be altered or amended by the legislature," apply to a contract with the company made in a supplement passed long after; Such reservations of the right to repeal found in statutes, unlike similar provisions in the constitution of a state, are only binding on succeeding legislatures so far as they choose to adopt them, and a legislative contract may be made which is not repealable if the legislature so intend; It is, therefore, in every case a question whether the legislature making the contract intended that the former provision for repeal or amendment should become a part of the new contract by implication; In this case the contract of 1865, for a specific rate of taxation, was inconsistent with any such implication, because, 1st, there was a subject of dispute and a fair adjustment of the controversy for a valuable consideration on both sides; 2d, the contract assumed, by the requirements of the legislation, the shape of a formal, written contract signed by both parties; 3d, the terms of the contract, that "this tax shall be in lieu and satisfaction of all other taxation or imposition whatsoever, by or under the authority of this state, or any law thereof," when viewed in the light of the whole transaction, do not admit the idea of the right of the state to revoke it at pleasure.—*The State et al. v. Yard, Commissioner, etc.*, U. S. Sup. Ct., C. L. J., Dec. 7, p. 483; *s. c.*, C. L. N., Dec. 8, p. 90; *s. c.*, Alb. L. J., Dec. 29, p. 466.

— Act shortening the statute of limitations—When constitutional as to pre-existing actions.—By a statute of limitations of the state of Georgia, actions against a stockholder of a bank to enforce his individual liability were not barred until twenty years from the time the action accrued; By an act of the legislature of Georgia, passed March 16, 1869, it was provided that such actions, accrued before June 1, 1865, should be barred if not commenced before January 1, 1871; *Held* (1), that the legislature had a constitutional right to shorten the statute of limitations as to actions upon the contracts already made, a reasonable time being left to enforce the contract; (2) and that the time given was reasonable.—*Terry v. Anderson*, U. S. Sup. Ct., Alb. L. J., Jan. 6, p. 14.

— Art. 9, sec. 7, of the new constitution—Effect on prior acts inconsistent therewith—Appropriation by a county of public money to a corporation—Act of March 29, 1851—Not repealed by the new constitution.—Art. 9, sec. 7, of the constitution of 1874, provides: "The general assembly shall not authorize any county, city, borough, township, or incorporated district to become a stockholder in any company, association, or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution, or individual;" The act of March 29, 1851, incorporating the "Pennsylvania State Agricultural Society," provides, sec. 4, that when similar county societies are organized, and a sum of money raised annually by voluntary contribution of its members paid into their treasury, "the said county society shall be entitled to receive annually a like sum from the treasurer of their said county; *provided*, that said annual payment out of the county funds shall not exceed one hundred dollars;" *Held* (affirming the judgment of the court below), that Art. 9, sec. 7, of the new constitution was wholly prospective in its prohibitions, and did not repeal said act of 1851; *Per curiam*—"This section deals only with legislative power; that power is thereby limited and restricted; it declares what it 'shall not' do; it annulled nothing that the legislature had done; it forbids such legislation thereafter; its prohibitions were wholly prospective. *Lehigh Iron Co. v. Supervisors of Lower Macungie Township*, 81 Sm. 482; *s. c.*, 3 W. N. 29, followed.—*Indiana County v. Indiana, etc., Society*, Sup. Ct. Pa., W. N. C., Dec. 20, p. 481.

— Constitutional limitations — Municipal courts — Removal of causes. — 1. Where circuit courts are established by the constitution with "original jurisdiction in all matters * * * not excepted in this constitution, and not prohibited by law," a law giving a local or municipal court such powers as as would substantially enable it to revise the action of the circuit court is invalid; 2. Where a cause has once begun to be heard in a court of general original jurisdiction, it cannot thereafter be removed to a municipal court of coordinate powers, as that, in effect, would be to subordinate the general to the local court; 3. A cause had been heard on its merits and a decree therein for an accounting partly executed; *Held*, too late to remove it to a coordinate court.—*People v. Circuit Judge* (with note), Sup. Ct. Mich., C. L. J., Nov. 80, p. 468.

— Construction of ordinance imposing wharfage fees proportionate to tonnage of vessels.—*Held*, that a municipal corporation of a state having by the law of its organization an exclusive right to make wharves, collect wharfage and regulate wharfage rates, may charge and collect wharfage proportionate to the tonnage of the vessels, from the owners of enrolled and licensed steamboats mooring and landing at the wharves constructed on the banks of a navigable river.—*Keokuk, etc., Packet Co. v. City of Keokuk*, U. S. Sup. Ct., C. L. N., Dec. 8, p. 91; *s. c.* (with note), C. L. J., Dec. 14, p. 504.

— Corporations—Art. 16, sec. 7, of new constitution—Construction of—Its effect upon pre-existing corporations—Set-off—Claims founded on torts cannot be set off—Banks—Fraudulent insolvency—Winding up—Act of April 16, 1850—Act of April 12, 1867—Jurisdiction thereunder exclusive.—A bank, as an inducement to A to keep a large balance on deposit, assigned a mort-

gage to him as collateral security for such account; The mortgaged property was afterwards sold at sheriff's sale and purchased by the bank, and on January 29, 1876, in consideration of A's release of all his claims under the said assigned mortgage, the bank gave him in its stead a new mortgage upon the same property; *Held*, that the execution of this mortgage created no new indebtedness of the bank, and, therefore, did not require, under Art. 16, sec. 7, of the new constitution, a ratification by a majority of the stockholders; *Held, further*, that, even if it were the creation of a new indebtedness, it would not be illegal, as the new constitution is not applicable to preëxisting corporations, unless they have entered into a new contract with the state by accepting the benefits of legislation subsequent to its adoption; *Held, further*, that in an action of *scire facias*, brought by A on his mortgage, evidence of losses arising from his misconduct as director of the bank was inadmissible to prove a set-off, (1) because claims founded on tort cannot be set off; (2) because of the difficulty of investigating, in a proceeding of this nature, actions of directors involving intricate questions of account and several conflicting equities; (3) because a bill in equity, under the act of April 12, 1867, had already been brought to adjudicate these claims, and the jurisdiction under that act is exclusive. *Hays v. Commonwealth*, 8 W. N. C. 549, affirmed.—*Ahl v. Rhoads et al.*, Sup. Ct. Pa., W. N. C., Dec. 20, p. 488.

— Elections—Bribery—Art. 8, sec. 9, of the constitution—*Quo Warranto*—Pleading—Sufficiency of suggestion—Demurrer—Effect of, whether general or special—Disqualification of officer on account of bribery—Act of April 18, 1874—Judgment of ouster.—An averment in a suggestion for a writ of *quo warranto* that the defendant paid money to M. other than for the legal expenses provided for in the act of April 18, 1874, "but for corrupt and illegal purposes in procuring his election," sufficiently charges a violation of the said act, and brings the defendant within the prohibition of Art. 8, sec. 9, of the constitution; A demurrer admits every fact well pleaded, and in a proper case the court will give judgment of ouster thereon; *Quere*, whether the certificate of the judge of the court below, filed in the cause, to the effect that a demurrer, general in form, was in fact confined to a special point, can be received to contradict the record.—*Com. v. Walter*, Sup. Ct. Pa., W. N. C., Dec. 13, p. 466.

— Inter-state commerce.—Section 6 of the act of the legislature of Kansas of 1876, entitled "An act for the protection of birds," Laws of 1876, pp. 183, 184, so far as it prohibits the transportation from Kansas to other states of prairie chickens which have been lawfully caught and killed, and have thereby lawfully become the subjects of traffic and commerce, is unconstitutional and void, being in contravention of that provision of sec. 8, Art. 1, of the Federal constitution which declares that "the Congress shall have power; * * * 3. To regulate commerce * * * among the several states."—*State v. Saunders*, Sup. Ct. Kan., C. L. J., Nov. 23, p. 444.

— Power of cities to contract indebtedness—Injunction.—Under the constitution of Illinois a city cannot become indebted for any purpose to an amount exceeding in the aggregate 5 per cent. on the value of its taxable property, to be ascertained by the last assessment for state and county purposes previous to the incurring of such indebtedness; and, if a city for any purpose exceed the constitutional limitation, it may be enforced at the suit of any citizen and tax-payer, and such plaintiff need not show that he is injured by the acts complained of otherwise than in common with all the other tax-payers of the city.—*City of Springfield v. Edwards*, Sup. Ct. Ill., C. L. J., Nov. 23, p. 447.

— Statute conferring power to sell real estate of ward upon one not the statutory guardian is unconstitutional.—1. The legislature, as *parens patriæ*, has power, by special act, in a case not provided by general law, to authorize a guardian to sell the real estate of his ward; But, if a minor has a guardian, the legislature cannot, by a special act, authorize a sale of the minor's land to be made by a person not his guardian, and who has no interest in the

property; 2. A statutory guardian has power coupled with an interest, and not a bare authority; 3. The legislature may, on the application of a person standing in the position of a trustee, and for a purpose apparently for the interest of a *cestui que trust*, authorize a sale of the property of the latter.—*Lincoln v. Alexander*, Sup. Ct. Cal., C. L. J., Jan. 5, p. 10.

CONTRACTS.—Illegal and fraudulent contract by railroad—*Credit Mobilier*.—A contract made by the Union Pacific Railroad Company with a party who afterwards organized with others and formed a corporation called the Wyoming Coal and Mining Company, by which the former company conveyed the right to prospect for coal upon its line to the latter for fifteen years, agreeing to purchase coal needed for its use for the said term from the latter, at prices named in the contract, set aside on the ground of fraud, the officers of the Union Pacific Railroad being shown to have been jointly interested with the other party to the contract.—*Wardell v. Union Pacific R. R. Co. et al.*, U. S. Cir. Ct., D. Neb., C. L. J., Dec. 21, p. 527.

— Real estate contract—Dower interest—Action to recover back money paid to bind contract—Rescinding contract—Misjoinder of parties—When not necessary to plead—The statute construed.—That it is an elementary principle of procedure that the proofs and allegations must agree, and that, to recover in actions *ex contractu*, a cause of action must be established against all the defendants, or there can be no recovery against any; Section 36 of the practice act construed and held not to so change the rule of the common law as to require a plea denying the joint liability of the defendants, where it is shown, as in this case, from the plaintiff's testimony that parties are made defendants against whom it affirmatively appears there is no cause of action made out; That appellants were not so in default as to authorize the appellee to rescind the contract and recover back the money paid thereon; That appellee did not make the point of objection that Mrs. Arnold might have dower in the property; If he had, appellants might have promptly removed the objection to appellee's satisfaction; That appellee, from the facts in evidence, was not in a condition to rescind the contract.—*Davison et al. v. Hill*, App. Ct., 1st D. Ill., C. L. N., Nov. 24, p. 73.

— Recovery of money paid on incomplete legal contract—*Locus penitentiae*.—When payments are made upon an illegal contract, and the parties are *in pari delicto*, a recovery can be had as for money had and received, where the illegality is in the contract itself, and that contract is not executed; In such case there is a *locus penitentiae*, the *delictum* is incomplete, and the contract may be rescinded by either party; A corporation in which plaintiff was a stockholder and trustee illegally instituted proceedings to increase its stock, plaintiff participating in such proceedings and subscribing for stock; By the agreement of subscription it was provided that payments on the new stock should be made to the corporation as called for by the directors, and that, in case of failure to pay within sixty days, the party failing should forfeit all previous payments; Plaintiff paid the first call, but failed to pay the second, and a forfeiture was declared against him, but before any scrip was issued for any of the increased stock the project to increase the stock was abandoned; Held, in an action thereafter brought to recover the money paid on the first call, that the *locus penitentiae* was still open to plaintiff, and he might recover. *Knowlton v. Empire Spring Co.*, 67 N. Y. 518, dissented from.—*Knowlton v. Congress, etc., Co.*, U. S. Cir. Ct., N. D. N. Y., Alb. L. J., Jan. 5, p. 10.

— Sale of grain for future delivery—Option contract.—1. The statute does not prohibit a party from buying or selling grain for future delivery, nor does it make any difference as to the legality of the contract whether the party selling for future delivery has the grain on hand at the time of such sale or not; 2. A contract for the sale of grain for future delivery, whilst it may give the purchaser an option to select a day within a limited time on which he will receive the grain, does not constitute such an option to buy at a future time as is prohibited by the statute.—*Logan v. Musick et al.*, Sup. Ct. Ill., C. L. N., Nov. 24, p. 73.

— Statute of frauds—Parol contracts for the sale of lands—Evidence.—A agreed verbally with B to do certain work for a certain price, in which was to be included a credit to B for the price of a lot of ground thereby agreed to be sold by B to A; A never took possession of the lot, nor actually allowed the credit; He did the work, and B presented a deed for a lot, and claimed the credit agreed on; A refused the deed and refused to allow any credit, alleging that the lot was not the one bargained for; In a suit by A for work and labor done, *held*, that evidence relating to the agreement as to the sale of the lot was inadmissible, as tending to enforce a parol contract for the sale of land in violation of the statute of frauds.—*Sands et al. v. Arthur*, Sup. Ct. Pa., W. N. C., Dec. 27, p. 501.

CORPORATIONS.—Cessation of corporate powers—Dissolution—1. The corporation act of Oregon, sec. 16 (Oreg. Laws, 528), declares that, if any corporation shall neglect and cease to carry on its business for any period of six months, its corporate powers shall cease; *Held*, that such neglect did not terminate the existence of the corporation as by lapse of time, but that it worked a forfeiture of the corporate privileges, of which no one but the state could complain or take advantage; 2. The corporation act aforesaid, sec. 19, provides that a majority of the stockholders may authorize the dissolution of a corporation; *Held*, that a vote of the stockholders authorizing a dissolution did not of itself dissolve the corporation, nor compel the directors to do so; and that the act of dissolution must proceed from the directors, who alone can exercise the corporate powers.—*The Wallamet, etc., Co. v. Kittridge*, U. S. Cir. Ct., D. Oreg., C. L. N., Dec. 29, p. 113.

— Dissolution of corporation.—Section 19 of the corporation act of Oregon (Oreg. Laws, 538) empowers the majority of the stockholders to authorize the dissolution of the corporation, "and the settling of its business and disposition of its property, and dividing of its capital stock in any manner it may see proper;" *Held* (1), that the authority to the directors to dissolve the corporation carried with it the incidental power to collect and distribute its assets and wind up its affairs; and (2) that a vote of the directors, declaring the corporation dissolved, only operates to prevent it from engaging in new business, but the corporation continues to exist, notwithstanding the declaration of dissolution, for the purpose of collecting and distributing its assets and winding up its affairs.—*The Wallamet, etc., Co. v. Kittridge*, U. S. Cir. Ct., D. Oreg., C. L. N., Jan. 5, p. 122.

— Liability of directors for debts of—Act of July 18, 1863—Statutes of limitation—Act of March 28, 1867.—The liability arising from the infringement of letters patent is not a debt within the meaning of the act of July 18, 1863, relating to corporations for mechanical and other purposes, and making the directors of any such company individually liable, in certain cases, for its debts; The act of March 28, 1867, declaratory of the statutes of limitation, construed and applied.—*Roberts v. Reed*, *Roberts' Appeal*, Sup. Ct. Pa., W. N. C., Nov. 22, p. 417.

— Liability of stockholders—Bankruptcy—Reëxamination in the supreme court—Assignment of errors—Stock book as evidence—Judgment—How to be authenticated.—1. That cases of the kind before the court may be reëxamined in the Supreme Court of the United States, as well as in the circuit court, upon the bill of exceptions filed in the district court; 2. The court states that assignments of error should be specific and definite, and what under the rule is required in this regard; 3. That, where the name of an individual appears upon the stock-book of a corporation as a stockholder, the *prima facie* presumption is that he is the owner of the stock, in a case where there is nothing to rebut that presumption; and, in an action against him as a stockholder, the burden of proving that he is not a stockholder, or of rebutting that presumption, is upon the defendant; 4. That the records of state courts, in order that they may be admissible in the courts of other states, must be authenticated as required by the act of Congress, but that act does not apply to the courts of the United States, nor to the public acts, records, or judicial proceedings of a state court to be used as evidence in

another court of the same state; 5. That the district court of the United States, even out of the state composing the district, is to be regarded as a domestic, and not a foreign, court, and that the records of such a court may be proved by the certificate of the clerk, under the seal of the court, and that without the certificate of the judge the attestation is in due form; 6. That bankruptcy proceedings are in all cases deemed matters of record, and are to be carefully filed and numbered, but are not required to be recorded at large: Short memoranda of the same shall be made in books kept in the office of the clerk; Copies of such records, duly certified under the seal of the court, are in all cases *prima facie* evidence of the facts therein stated.—*Turnbull v. Payson, Assignee*, U. S. Sup. Ct., C. L. N., Dec. 8, p. 89.

— Shares of stock of a corporation are subject to attachment, and the corporation may be summoned as garnishee in the same proceeding.—The shares of a stockholder in a joint-stock company, incorporated by, and conducting its operations in whole or in part in, the state, are such estate as is liable to be attached in a proceeding instituted for that purpose by one of the creditors of such stockholder; and such estate may properly be considered, for the purpose of such proceeding, as in the possession of the corporation in which the shares are held, and such corporation may properly be summoned as garnishee in the case; Of such proceeding a court of law has jurisdiction, as well as a court of equity: Where, along with the answer of the corporation in such proceeding, an affidavit is filed alleging that some third person claims the said stock, and that the corporation claims no interest therein, nor colludes with such claimant, but is ready to dispose of the stock as the court shall direct, the court should require such third person to appear and state the nature of his claim, and maintain or relinquish the same; If in such a proceeding the stock should appear to be liable to the lien of the attachment, it ought to be sold for the satisfaction of the same, under an order of the court made for that purpose, in the attachment proceeding; but it is error for the court to render a judgment against the garnisheered corporation for the value of the stock, unless it appears that the lien of the attaching creditor on the stock was lost by the act of the corporation.—*Chesapeake, etc., R. R. Co. v. Paine et al.*, Sup. Ct. App. Va., Va. L. J., December, p. 735.

COURTS.—Jurisdiction of United States circuit courts.—1. The circuit court has not jurisdiction of a case, irrespective of the citizenship of the parties, unless it arises out of a law of the United States, nor is an averment that an action arises out of such law sufficient to confer jurisdiction, but it must appear from the facts stated that it does so arise; 2. An averment that the trial of an action will necessarily involve the construction of certain acts of Congress does not show that such action arises out of such laws; 3. The original jurisdiction conferred on the circuit courts by sec. 1 of the act of March 8, 1875 (18 Stat. 470), does not include an action arising out of the contracts or dealings of the parties, although upon its trial a question may arise involving the proper construction of a law of the United States.—*Dowell v. Griswold*, U. S. Cir. Ct., D. Oreg., C. L. N., Dec. 22, p. 107.

— Practice in taking depositions to be used in Federal courts is governed by special acts of Congress, and is not to be regulated by practice in State courts.—The act of Congress of June 1872, sec. 914, U. S. Rev. Stat., which requires that the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts of the United States, shall conform, as nearly as may be, to the practice, pleadings, forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, has no application to the manner of taking depositions to be used in the Federal courts. The requirements which must be followed in taking depositions to be used as evidence in the Federal courts are prescribed by secs. 863–865, U. S. Rev. Stat., which have not been repealed by sec. 914.—*Sage v. Tausky*, U. S. Cir. Ct., S. D. Ohio, C. L. J., Jan. 5, p. 7.

— Removal of criminal case from State to Federal court under Rev. Stat.

U. S., sec. 643.—1. Under sec. 643 of the Rev. Stat. U. S., providing for the removal of criminal cases from a State to a Federal court, the prosecution is not commenced until the finding of an indictment; 2. In such a case the right of the defendant to challenge jurors is governed by the laws of the United States; 3. On an indictment for murder, the guilt or innocence of the prisoner must be determined by the laws of the state.—*State of Georgia v. O'Grady*, U. S. Cir. Ct., N. D. Ga., C. L. J., Nov. 30, p. 465.

— Removal of suit from State to Federal court.—1. Under the code of Iowa, equity suits are not triable at the appearance term, and such suits may, under the act of March 3, 1875 (sec. 3), be removed to the circuit court of the United States at the second term; 2. Under that code the same rule, as to the time of removal, applies to suits to foreclose mortgages, at least where there is no rule of court requiring such suits to be tried at the appearance term.—*Palmer v. Call*, U. S. Cir. Ct., D. Iowa, West. Jur., December, p. 696.

— Removal of suits from State to Federal court.—To entitle a non-resident, in a case where there are several defendants, to remove case to circuit court, the controversy must be wholly between him and the plaintiff, so that final decree could settle the case.—*Tyler v. Hagerty*, U. S. Cir. Ct., N. D. Ohio, Am. L. Rec., January, p. 385.

— Removal of suit from State to Federal court.—Parties seeking to remove causes to the United States courts must comply strictly with the provisions and conditions presented by the statute, and any material omission would be fatal to such removal; The petition for removal must be filed at the term at which the case can be first tried, and before trial thereof, and not after such term.—*Wilcox & Gibbs, etc., Co. v. Follett et al.*, U. S. Cir. Ct., N. D. Ohio, Am. L. Rec., January, p. 389.

— Removal of suit from State to Federal court in case of a railroad corporation of one state leased by a railroad corporation of another state.—Where a railroad company which was incorporated in another state leases a railroad lying in this state, and operates the same as owner thereof, and an injury occurs on said railroad, the person having the right of action for such injury may sue the railroad company in the courts of this state, and such company has no right to remove the suit to the Federal court.—*Baltimore, etc., R. R. Co. v. Wightman's Administrator*, Sup. Ct. App. Va., Va. L. J., December, p. 715.

— Removal of suit to Federal court under act of 1789.—A petition for the removal of a cause from a State to the Federal court under the act of 1789 must expressly state that the parties were citizens of the respective states at the time the suit was commenced.—*Phoenix Insurance Co. v. Pechner*, U. S. Sup. Ct., Alb. L. J., Dec. 1, p. 392.

— Removal of suit to Federal court under act of 1867.—A State court is not bound to surrender its jurisdiction, upon a petition for removal, until at least a petition is filed which upon its face shows the right of the petitioner to transfer it; Under the act of 1867 a petition for removal must state the personal citizenship of the parties, and not their official citizenship.—*Amory v. Amory*, U. S. Sup. Ct., Alb. L. J., Dec. 1, p. 392.

— State statutes and practice in Federal courts.—A rule of U. S. Cir. Ct., N. D. Ohio, adopting certain laws regulating the state practice, was applied to a case of imprisonment for debt; But it was held that, although the Ohio state practice required the affidavit for arrest to be sworn before certain state officers, a United States commissioner might take the verification.—*Fulton v. Gilmore*, U. S. Cir. Ct., N. D. Ohio, Am. L. Rec., December, p. 387; s. c., C. L. N., Dec. 22, p. 108.

CRIMINAL LAW.—Burglary—Indictment should be general.—The court must determine the degree before sentence upon a plea of guilty.—An indictment to cover both degrees of burglary must not specify that the entry was either by day or night; the averment must be general, and such averment must be construed as charging both as entry by day and by night; And, upon a plea

of guilty under such an indictment, the court must first determine the degree—whether an entry was made by day or by night, whether first or second degree—from the evidence, before passing sentence.—*People v. Jefferson et al.*, Sup. Ct. Cal., C. L. N., Dec. 29, p. 114.

— Defendant upon indictment for forgery has no right to be present at hearing of motion for new trial.—A defendant in an indictment for forgery has no right to be personally present at the hearing of a motion in his behalf for a new trial; and his absence, though in jail, will not invalidate a sentence subsequently passed upon him when he is present; The court will not hear or determine such a motion if the defendant is not within its control—not because he is entitled to be present, but because the court will not hear him unless he is there to abide by the decision.—*Com. v. Costello* (with note), Sup. Jud. Ct. Mass., Am. L. Reg., December, p. 734.

— Evidence—Defendant allowed to testify as to his intent.—A defendant in a criminal case, who is made a competent witness by statute, may testify to his intent in doing the act charged as a crime. The fact that intention is incapable by its nature of being known positively to other persons, and, therefore, can only be proved inferentially, does not affect the rule allowing a witness to testify.—*White v. State*, Sup. Ct. Ind., Am. L. Reg., December, p. 751.

DAMAGES.—Measure of damages recoverable in action, under a statute, to recover damages for the death of a person.—In an action under ch. 145, secs. 7-9, Code of 1873, to recover damages for the death of a person, caused by the wrongful act, etc., of another, it is not necessary to aver in the declaration for whose benefit the action is brought; In such an action the jury, in assessing the damages, are not confined to the mere pecuniary loss and injury, but may give such damages as to them "may seem fair and just." Where, in such an action, the death was caused by the wrongful act of the defendant, it is no defence that the death was the result of the misconduct or neglect of the deceased, but that circumstance may affect the *quantum* of damages; In order to entitle a party to a continuance on the ground of the absence of a material witness, it is necessary that he should have used due diligence to ascertain the materiality, and to procure the attendance, of the witness.—*Mathews v. Warner's Admr.*, Sup. Ct. App. Va., Va. L. J., December, p. 741.

— Punitive—Principal liable for injury caused by his agent—Evidence—Ratification—Common carrier.—1. A principal is liable in both compensatory and punitive damages for the malicious act of his agent if he has authorized the act, or ratifies it without having authorized it; 2. The promotion of the agent is competent evidence tending to show ratification; 3. Plaintiff, a passenger on one of defendant's trains, entered the ladies' car against the orders of the officers in charge of the train, there being no vacant seats in the other cars; He was forced to leave the train, while it was in motion, by a brakeman, who did not, however, use unnecessary violence: The brakeman was retained in the employ of the company and promoted: A jury gave plaintiff a verdict of \$2,500 compensatory, and \$2,000 punitive, damages; The appellate court refused to disturb the verdict.—*Bass v. Chicago, etc., Ry. Co.*, Sup. Ct. Wis., Rep., Jan. 16, p. 85.

DECEIT.—Action for deceit—Purchase on credit—Representations as to solvency—When defendant not liable for honest, but mistaken, statements on which he obtained credit—*Bona fides* a question for the jury.—An action of deceit will not lie for representations of solvency which, though in fact false, the defendant believed at the time to be true; and the honesty of his belief is a question for the jury; In an action to recover damages for a false and fraudulent representation by defendant of his circumstances, by which the plaintiff had been induced to give him credit, defendant's counsel submitted the following point: "That, if the jury believe that the defendant, at the time of using the statement attributed to him, really believed himself to be solvent, then his subsequent bankruptcy and insolvency, as matters of

fact, do not avail to make the defendant liable in the present action, and their verdict should be for the defendant;" to which the court answered as follows: "Affirmed, with the qualification that, if he really believed himself to be solvent, upon reasonable grounds, then he would not be liable;" *Held*, that defendant was entitled to an unqualified affirmation of his point, and the qualification added was erroneous.—*Dilworth v. Bradner et al.*, Sup. Ct. Pa., W. N. C., Dec. 27, p. 505.

— Party making representations that afterwards become false—Not liable—

When.—Horriggan applied to Thatcher, the cashier of a bank, for information concerning the solvency of Toof, Phillips & Co.; Thatcher replied favorably as to their credit, and upon this assurance plaintiff from time to time purchased large amounts of the bills and acceptances of said firm; Eight months later Toof, Phillips & Co. failed, and plaintiff lost \$2,000 by his investments; thereupon he brought suit against Thatcher and the bank for deceit; *Held*, an honest statement of a mere opinion, however erroneous, as to the solvency or reliability of another cannot furnish the grounds for an action of this character; A party cannot be held, in such a case, to have given a continuing guaranty against future contingencies, nor to have bound himself to notify the other of what he may well be assumed to be able to discover for himself; Answering questions as to the solvency of parties is no part of the business of a cashier of a bank, nor fairly included within the scope of such business; It may be, and probably is, an incident of such position, but not an incident to it; *Held*, no liability attaches to the bank in such case; When the holder of paper has given credit to a third party upon the recommendation of a cashier of a bank, and the debtor is ready and offers to pay the note at maturity, and the holder instructs the cashier to give the debtor an extension of time, which the debtor accepts, and then fails, the cashier, though he had rendered himself liable by his recommendation, is discharged by the release of the holder.—*Horriggan v. First Nat. Bank et al.*, Sup. Ct. Tenn., Tenn. L. Rep., December, p. 253.

DEEDS.—Line of lot defined—Beginning and continuation of line of lot.—1.

When the line of a lot is made a boundary, it means the true line, not a conventional one agreed upon by the parties; 2. When the call of a deed is to a (the Cilley) line, thence on the southerly line of said (Cilley) lot a certain distance, the call begins and continues on such line. Thus, where the call in the deed was to the Cilley line, thence on said line, about twelve feet, to a stake and stones, and the stake and stones were not in fact upon the true Cilley line, but on a conventional one, they were rejected.—*White v. Jones*, Sup. Ct. Me., Rep., Jan. 23, p. 111.

ESCENTS AND DISTRIBUTION.—Decedent's estate—Distribution—Policy of life insurance—Distribution of proceeds of.—M., in whose favor her husband's life was insured, died in his lifetime intestate, leaving an only child; Subsequently the husband died intestate and insolvent, the child surviving him; *Held* (affirming the decree of the court below), that the proceeds of the policy were the estate of the wife, and as such were to be distributed, under the intestate laws, between her child and the estate of her husband in equal shares.—*Anderson's Estate*, Sup. Ct. Pa., W. N. C., Dec. 18, p. 468.

DEVISE.—Devise to "family"—Construction—Extraneous evidence—Husband's interest—Execution sale.—1. Devise of certain real estate to "H. S. and family," etc.; At the death of the testator, said H. S., his wife, and six children were living; *Held*, that these words would be construed to include them all, and that H. S. and wife took an estate by entireties, and the children as tenants in common; Husband and wife took together one-seventh of the land, and the children the other six-sevenths; 2. Extraneous evidence is admissible to show the members of the family, and of whom composed; 3. "The husband's interest, during his life at least, passed by reason of the execution sale, and his wife, surviving, took that whereof they had been jointly seized;" 4. The statute of Missouri (2 Wag. Stat., sec. 114, p. 435) does not affect the question.—*Hall v. Stephens*, Sup. Ct. Mo., C. L. J., Dec. 21, p. 530.

— Distribution at majority—Several trust—Vested remainder—Power of alienation—Survivorship—Beneficiary after period of survivorship.—L. devised the residue of his estate to trustees in trust for his grandchildren, the children of his son and daughter, and to the survivors of them, share and share alike, "to be paid and conveyed to each of said children respectively, as they become of age, in equal shares;" the income, "in the meanwhile," to be applied to the support of the grandchildren under the care of the executors; *Held*, that the grandchildren took *per capita*; that the trustees took a legal title upon a several trust for each of the grandchildren, each of whom took a vested remainder expectant upon the termination of the trust at his or her coming of age; that there was no suspension of the power of alienation; that the words of survivorship must be construed as referring to the death of the testator; that the grandchildren were tenants in common, and, in case of the death of either of them, his or her share would pass absolutely. The child of the testator's son, named in the residuary clause, born after the testator's death and before the time for any of the *corpus* to be distributed, took a share.—Stephenson, Guardian, etc., v. Lesley *et al.*, Executors. Ct. App. N. Y., Rep., Jan. 16, p. 75.

— Entail—Contingent remainder—Concurrent remainder.—A. devised land to his daughter B., "for and during the term of her natural life, and, in case she shall leave lawful issue, then to such issue, their heirs and assigns, in fee simple; but, in case she shall leave no lawful issue," then over to C., "he paying to each of his brothers and sisters that are now, and shall be then living \$250 within one year after he shall come into his possession by virtue of this devise." In the lifetime of B., C., by deed, conveyed his remainder to R.; Afterwards B., by a deed executed under the act of 1799, for the purpose of barring entails, conveyed the land to R. in fee; Upon B.'s death, J., a brother of C., petitioned the court to compel R. to pay him his legacy of \$250: The court below held that the devise created an estate in B. for life, with concurrent contingent remainders in fee in the issue of B., and in C., and decreed payment of J.'s legacy; *Held*, that the result reached by the court below was correct, and that the steps by which that conclusion was reached were not essential.—Peirce's Appeal, Sup. Ct. Pa., W. N. C., Nov. 29, p. 439.

DOWER.—Jurisdiction of common pleas to award—Right of widow to distrain for.—Courts of common pleas have jurisdiction in equity to award an annual sum in lieu of dower, and to charge the same upon particular real estate of a decedent; The right of distress is incident to dower so charged: A husband having willed his widow nothing, she filed a bill in equity in the court of common pleas praying an award of her dower, whereupon a decree was entered, with the consent of all the parties in interest, awarding her an annual sum, payable in quarterly payments, as and for her dower, and making it a charge upon certain lands of the decedent; The widow distrained for arrears of dower upon goods found on the premises so charged, being the property of a tenant holding under the devisees of the decedent, in replevin by the tenant: *Held*, that the court of common pleas had jurisdiction to award dower; *Held, further*, that the widow might distrain upon the premises charged for the quarterly payments so awarded.—Borland v. Murphy, Sup. Ct. Pa., W. N. C., Dec. 18, p. 472.

EASEMENTS.—Limitation of easement by acts of grantee.—Plaintiff, by written instrument, gave defendant a right to lay and maintain across his land a pipe to convey water from a spring; The instrument did not specify the size of the pipe or where it should be laid; *Held*, that by laying pipe of a particular size across plaintiff's land defendant fixed the size, and was not entitled thereafter to replace it by pipe of a larger size.—Onthank v. Lake Shore, etc., R. R. Co., Ct. App. N. Y., Alb. L. J., Dec. 15, p. 428.

EJECTMENT.—Title—Deed—Cancellation of by burning—Substitution of new deed by the parties, conveying a different estate—Evidence—Secondary evidence of contents of burnt deed—When not necessary to submit such evidence to a jury—Estate to husband and wife in entirety.—A deed was executed to A and his heirs, for a tract of land, and delivered, but not recorded.

A few days afterwards, by consent of all parties, a new deed was executed and delivered by the same grantors to A and B (husband and wife) and their heirs, for the same premises, and the first deed was then destroyed by burning; Subsequently the second deed, which was not recorded, was destroyed by an accidental fire; A died intestate; In ejectment brought by his heirs against B, his widow, *held*, that the second deed was the only valid one, and conveyed an estate by entireties to A and his wife, with right of survivorship; *Held, further*, that, there being no real controversy as to the evidence relating to the execution, destruction, and contents of the deeds, it was not error to withdraw the case from the jury and direct a verdict for the defendant.—*Gardner et al. v. McLellan*, Sup. Ct. Pa., W. N. C., Nov. 29, p. 435.

ELECTIONS.—Ballots cast as the controlling evidence—Tampering with ballots.—1. As between the ballots cast at an election and a canvass of those ballots by the election officers, the former are the primary, the controlling, evidence; 2. In order to continue the ballots as controlling evidence it must appear that they have been preserved in the manner and by the officers prescribed in the statute, and that while in such custody they have not been so exposed to the reach of unauthorized persons as to afford a reasonable probability of their having been changed or tampered with.—*Hudson v. Solomon*, Sup. Ct. Kan., Alb. L. J., Nov. 17, p. 349.

EQUITY.—Account—Right of principal to. —Part payment received by principal upon an account stated by agent, but not accepted as an account stated by principal, will not preclude principal from right to an account in equity.—*Walker, Assignee, v. Kremer et al.*, U. S. Cir. Ct., E. D. Pa., W. N. C., Nov. 22, p. 432.

—Chancery court—Has no power to protect parties possessing statute privileges and franchises.—When—Statement.—The banks of the river are owned by different persons; both run a ferry and have the same landing, one with, the other without, a license; *Held*, land may be appropriated to the use of a public ferry as an easement for the benefit of the public, but a person who runs a ferry under a license has no such rights against third persons, who set up an opposition without license, as a court of equity can protect by injunction or otherwise.—*Levisay v. Delph et al.*, Sup. Ct. Tenn., Tenn. L. Rep., December, p. 275.

—Equity jurisdiction—Rights of unincorporated religious societies.—Certain members of two unincorporated religious societies, being a minority of the members of said societies, without the concurrence of the regular church organizations or of the congregations, obtained from the court of common pleas of Lancaster county a charter, in which it was provided that they should have "the right, as separate congregations, to call, employ, and contract with such ministers and other religious persons as they may severally require;" By virtue of this charter they asserted the right to control the organization of the two churches, and to take exclusive possession of their land and buildings; *Held* (reversing the decree of the court below), that the jurisdiction of a court of equity was properly invoked by the officers appointed by the majority in the two congregations; *Held, further*, that the charter so obtained gave to the corporators no right in or to the organization, or land, or church buildings of the said two societies.—*Henry et al. v. Dietrich et al.*, Sup. Ct. Pa., W. N. C., Dec. 20, p. 487.

—Misrepresentations—Ground for relief in equity, when.—Whether a party misrepresenting a fact knows it to be false, or made an assertion without knowing it to be true, on which another relies, is immaterial in a court of equity; It equally operates a surprise and imposition on the other party, and is ground for relief.—*Chester v. Canfield et al.*, Sup. Ct. Tenn., Tenn. L. Rep., December, p. 258.

—Relief refused for mistake of fact, when.—A mistake which will entitle a party to relief in equity must be a mistake of fact, without negligence on his part; Where facts are known, or might be known except for negligence,

the ignorance of legal consequences is not a mistake of fact for which equity will grant relief; A purchaser at an execution sale cannot in equity be excused from consummating his purchase, because, never having attended such a sale before, and not hearing the terms of the sale, he supposed himself to be buying the entire estate in question, and not the "right, title, and interest" of the judgment debtor in it.—*Upham v. Hamill*, Sup. Ct. R. I., Am. L. Reg., January, p. 48.

— Setting aside sale for mere inadequacy of price.—Mere inadequacy of price alone will not constitute a sufficient ground for setting aside a judicial sale, fairly made, pursuant to the decree of the court ordering the sale; or, if mere inadequacy of price will suffice in any case, it should only be where a material advance is offered, and the money deposited or well secured.—*Custis v. Thompson et al.*, Sup. Ct. App. Va., Va. L. J., December, p. 74.

ESTOPPEL.—By positive act of party in ignorance of law, without fraud—Proceeds of real estate belonging to a third person sold by executor in mistake of title—Estate by entireties.—Where the owner of land by a positive act induces another to purchase such land from a third person, such owner is estopped from setting up her title against the purchaser, although the parties have all acted *bona fide*, and in ignorance of the true state of the title.

Where an executor with power to sell has by mistake sold the land of another, and the sale has been concurred in by the true owner of the land in such a manner as to work an estoppel, the purchase-money belongs to the true owner of the land, and the executor is not chargeable, as such, with it in his account.—*Miller's Appeal*, *Ferguson's Estate*, Sup. Ct. Pa., W. N. C., Nov. 15, p. 405.

— Trust for charity—Church—Ecclesiastical law—Denominational connection—Doctrinal belief—Costs—Mesne profits—Amendments in equity, when not permitted.—Where denominational connection is one of the conditions of a charitable trust for the maintenance of a church, the trust is violated by a severance of the denominational relation, though the doctrinal belief continues identical; The acquiescence of a trustee and his co-plaintiffs, holding church property in trust for certain religious uses, to acts of others in violation of the trust, will not estop such plaintiffs from subsequently intervening by bill in equity to recover possession of the church property in order to maintain the trust; But such assent will bar their right to an account of mesne profits during a protracted litigation to recover such possession, in which plaintiffs were finally successful; Under such circumstances each party will be required to pay their own costs.—*Jones et al. v. Wadsworth et al.*, Sup. Ct. Pa., W. N. C., Jan. 8, p. 514.

EVIDENCE.—Contract—Trade terms—May be explained by testimony of persons in the business—"Buyer's option" in contract for delivery of oil.—Parol evidence is admissible to explain the trade meaning of technical terms used in a contract, verbal or written, between parties engaged in a particular business.—*Hackett v. Smith*, Sup. Ct. Pa., W. N. C., Dec. 18, p. 475.

— Expert—A person may be punished for contempt for refusing to testify as an expert.—A physician, like any other person, may be called to testify as an expert in a judicial investigation, whether it be of a civil or criminal nature, without being paid for his testimony as for a professional opinion; and, upon refusal to testify, is punishable as for a contempt.—*Ex parte Dement*, Sup. Ct. Ala., C. L. J., Jan. 5, p. 11.

— Lost records—How supplied—Power of court.—The courts of this state possess the inherent power of supplying records destroyed by fire or other casualty; Section 2521 of the Code of 1878 does not affect the power of a court to supply a lost record; it was enacted to prevent parties holding judgments from suing thereon and accumulating costs.—*Gammon et al. v. Kundson et al.*, Sup. Ct. Iowa, West. Jur., November, p. 660.

— Parol evidence—Admissibility of, to vary written contract.—Parol evidence is admissible, in an action on a writing, to show that, at the execution

of the writing, a stipulation had been entered into, a condition annexed, or a promise made by word of mouth, upon the faith of which the writing was executed, although such evidence may vary and materially change the terms of the contract; In debt on a bond the defendant offered to show that the bond was given for the purchase-money of real estate, under a contemporaneous parol stipulation, offered as an inducement to the purchase, that, if defendant was not satisfied with his bargain, the plaintiff would, on request, take back the property, and pay the defendant a premium, besides the cost of all improvements put on the land by defendant; further, that plaintiff agreed verbally that there should be no personal liability on the defendant's part by reason of the bond, which was secured by a mortgage of the premises sold, but that plaintiff would look solely to the land for payment; further, that the plaintiff would not part with the ownership of said bond; that plaintiff, on being requested to insert these stipulations in the papers, declined, saying his word was as good as his bond; and, finally, that defendant had requested plaintiff to take the property back, as so agreed on, but the latter refused, and brought suit for the purchase-money; *Held* (reversing the judgment of the court below), that these offers were improperly rejected.—*Greenawalt v. Kohne et al.*, Sup. Ct. Pa., W. N. C., Dec. 27, p. 497.

FALSE IMPRISONMENT.—Arrest by military force—Treatment of prisoner.—1. A person arrested by military force for the violation of sec. 20 or 21 of the Indian intercourse act of June 30, 1834 (4 Stat. 732), is not a military prisoner subject to the articles of war, but a citizen charged with a non-military crime, and must be removed for trial by the civil authorities within five days from his arrest or discharge; and his detention thereafter under any circumstances is unlawful; 2. A person under arrest as above stated may be confined in the military prison, but he cannot lawfully be required to labor, or perform any duty other than taking care of his person.—*Waters v. Campbell*, U. S. Cir. Ct., D. Oreg., C. L. N., Nov. 17, p. 68.

FRAUDULENT CONVEYANCES.—Voluntary conveyance of property in fraud of creditors.—Payment of debts does not rebut evidence of fraud, when.—1. *Norvell, Boone & Co.*, of Memphis, obtained credit from *Brady & Co.*, in New Orleans, through one of their members (*McKean*), upon the faith of his individual estate, which he promised should remain in his own name, and be subject to his debts; but, soon after, *McKean* made a voluntary conveyance of his property, when his firm was in doubtful circumstances, without warning *Brady & Co.*, who continued the credit previously obtained; *Held*, such a conveyance is evidence of fraud in fact, and the registration of the deed does not alter the case; The property so conveyed will be liable to the satisfaction of debts due such creditor, though contracted subsequent to the conveyance; A creditor has no right to convey all of his tangible property, and leave his creditors to take their chances of realizing their debts from assets consisting of bills and accounts payable, where the proof fails to show that such assets were available to creditors; As the deed is void for fraud in fact, all the creditors will be allowed to share the proceeds; 2. Where a debtor makes a voluntary conveyance, and afterwards pays a large part of his liabilities, this does not rebut the evidence of fraud.—*Levering et al. v. Norvell et al.*, *Brady et al. v. Norvell et al.*, Sup. Ct. Tenn., Tenn. L. Rep., December, p. 247.

GUARANTY.—Guaranty to M. to "supply and furnish goods to C." construed.—A guaranty in the following words, "In consideration of you, the said M., having, at my request, agreed to supply and furnish goods to C., I do hereby guarantee to you, the said M., the sum of £500," is to be construed to apply to the goods thereafter supplied.—*Morrell v. Cowan*, Ct. App., Ch. Div. (Eng.), Rep., Jan. 9, p. 60.

HIGHWAY.—Right of the owner of adjoining land to temporary use of—Contributory negligence—Burden of proof.—The owner of land adjoining a highway may temporarily occupy the highway by placing building materials thereon, and will only be held liable for injuries resulting from a negligent or unreasonable use of his privilege; Negligence of a plaintiff contributing

to an injury complained of is a matter of defence, and ordinarily the burden of proving it is on the defendant.—*Mallory v. Griffey*, Sup. Ct. Pa., W. N. C., Dec. 27, p. 506.

HOMESTEAD.—Constitutional provisions regulating homesteads are beyond the power of legislative repeal or impairment—Occupancy—Area—Mortgage—Assent of wife—Death of husband leaving no widow or minor child—Rights of latter, if surviving—Exemptions of personalty—Exemptions from liability for debts of husband—Operation of subsequent modifying statute.—1. The constitutional exemption of every homestead "not exceeding eighty acres, or, in lieu thereof, "any lot in the city, town, or village * * * not exceeding the value of two thousand dollars," is not a limitation or restriction upon the power of the legislature to increase the exemptions; 2. These constitutional provisions are self-executing, and exempt absolutely, and beyond the power of legislative repeal or impairment, every homestead subject only to the limitation that the homestead, if in the country, shall not exceed eighty acres in quantity, no matter what its value, unless in excess of \$2,000; and that, whether in the country or in a city, it shall not exceed \$2,000 in value; 3. Actual occupancy by a resident of the state is necessary to confer the right of exemption; and this right is lost when the owner ceases to occupy the homestead; 4. Where the homestead—i. e., the dwelling-house and necessary appurtenances—cannot so be reduced in area as not to exceed \$2,000 in value, there is no exemption under the constitution, and, in the absence of legislation, no authority to allot the family an equivalent in money for the homestead exemption; 5. A mortgage of the homestead by the husband without the voluntary signature and assent of the wife is absolutely void; 6. Under the constitution, in the absence of statutory regulations, a certificate of the voluntary signature and assent of the wife is sufficient, if it follow the form and substance of the certificate required to constitute recorded deeds evidence, without further proof, under secs. 1548-52, R. C. 7. Where such certificate is in the requisite form, it cannot be impeached or assailed except for fraud or imposition practised towards the wife—a fraudulent combination between the parties interested and the officer taking the acknowledgment; 8. The homestead exemption under the constitution ceases upon the death of the husband, leaving no widow or minor child, and the homestead falls into his general estate; 9. If the husband leave a widow or widow and minor child, surviving him, the exemption continues during the life of the widow and the minority of the children, but they take no title to homestead beyond the right to use and occupy it; and, upon the death of the widow and the minors reaching maturity, the homestead reverts to the husband's estate. While the homestead thus exists, it is freed as well from administration, descent, and devise, as from "execution or other legal process," upon debts contracted since the adoption of the constitution in 1868; 10. The constitution, so far as concerns debts contracted after its adoption, is incompatible with the exemption provided by sec. 2061, subsec. 6, and sec. 3539 *g*, and to that extent repeals those sections; but, as no provision is made in the constitution exempting personalty after the death of the owner, the statutes of force on that subject at the time of the adoption of the constitution are not repealed by it; 11. The right to claim exemption of property from liability for debts of the husband depends on the law in force at the time of his death; 12. The "act to regulate property exempted from sale for payment of debts," approved April 23, 1873, makes several important changes in the constitutional exceptions; 13. The changes thus made operate on all homestead exemptions which have accrued since April 23, 1873.—*Miller et al. v. Marx*; *Coleman et al. v. Smith et al.*; *Taylor et al. v. Administrator, v. Anthony et al.*, Sup. Ct. Miss., South. L. J., Jan. 12.

—**Dower**—Widow entitled to both, when.—The right of dower is unaffected by any legislation creating a homestead, except as to the mode of its assignment prescribed by the act of 1873; The widow of an intestate decedent seized and possessed of real estate is entitled to both homestead and dower. The homestead shall first be set apart as dower is set apart, by the commissioners, and then one-third of the remainder will constitute the

dower.—*Lovelace v. Lovelace et al.*, Sup. Ct. Tenn., Tenn. L. Rep., January, p. 381.

HUSBAND AND WIFE.—Married women—Act of 1848—Reduction into possession—Acts of the husband as evidence of intention—Promissory note of husband to wife—Right of wife as a creditor of her husband.—A husband obtained his wife's money prior to 1848; In 1850, at her solicitation, he gave her a note for it, which note he renewed in 1874; In 1875 he made an assignment for the benefit of creditors; Upon a distribution of his estate, *held*, that the note was a recognition of the wife's right, and, it not appearing that the husband was insolvent at the time of making the note, the wife was entitled to a *pro-rata* share of his estate with subsequent creditors.—*Ann Ziegler's Appeal*, Sup. Ct. Pa., W. N. C., Dec. 6, p. 458.

—Wife—Capacity of, to contract, same as husband.—Under the statute of this state the wife is clothed with the same property rights, and charged with the same liabilities, as the husband; Indeed, it cannot be said that as to her property she is deprived of any rights which the husband enjoys that relate to his, or that any remedy is denied her, or any liability removed from her, which are possessed by, or imposed upon, the husband; She can control her own property, vindicate her own individual rights, and bind herself by contract as fully and to the same extent as her husband—*Spofford v. Warren*, Sup. Ct. Iowa, West. Jur., November, p. 643.

INFANTS.—Parents liable for maintenance, when.—A brother, as a volunteer, undertook the maintenance and education of his sister, who had abandoned her father's home, and without his fault; *Held*, under such circumstances, no promise to pay, by a mere volunteer, for the maintenance of the child, can be implied on the part of the parent; He who intervenes in such a case, to make the child independent of the parent, does but encourage its alienation from the line of filial duty, and stands in no relation to be favored by the law.—*Toncray v. Toncray*, Executor, Sup. Ct. Tenn., Tenn. L. Rep., January, p. 283.

—Pleading infancy in bar.—Infancy is a bar to an action on the case for false and fraudulent representations by a vendor or pledgor as to the ownership of property sold or pledged.—*Doran v. Smith* (with note), Sup. Ct. Vt., Am. L. Reg., January, p. 42.

INSURANCE, FIRE.—Insurable interest—When not full ownership—Where whiskey destroyed without payment of tax.—In this case the distillery and warehouse were owned by Deaven, but the spirits were owned by the defendants; When the policy was issued they were sureties on D.'s distillery bond, and as such were liable for the tax on the whiskey, if not paid by D. or made out of the whiskey; By the terms of the policy the companies bound themselves to "insure Messrs. Thompson & Co., against loss or damage by fire, to the amount of \$8,000, for the term of one year, upon whiskey, their own or held by them on a commission, including government tax thereon, for which they may be liable, contained in the log-bonded warehouse of G. H. Deaven;" The whiskey was burned; These companies paid their share of the loss on the value of the whiskey, apart from the tax, and the claim for liability on account of the tax remained undecided; Thompson & Co. were sued on their bond with D. for this tax, and the insurance companies refused to defend the suit; Judgment was obtained; Thompson & Co. replevied the judgment; This suit is by Thompson & Walston to recover the amount of these judgments; The court, after commenting upon what is an insurable interest, and the effect of a partial transfer of a part interest, held that the companies were liable on account of the tax on the whiskey.—*Germania Fire Ins. Co. et al. v. Thompson et al.*, U. S. Sup. Ct., C. L. N., Dec. 29, p. 113.

INSURANCE, LIFE.—Life policy—Notice of claim—Suicide—Evidence of insanity.—1. *Held*, in this case, that the words in the policy-notice, "of the just claim of the assured," had reference to her claim or title to the policy, and not to the justness of her cause of action thereon; 2. That, if there was any

evidence tending to prove that the deceased was insane when he took the poison which caused his death, the judge was not bound to, and could not properly, take the evidence from the jury; The court states under what circumstances the assured will be regarded as having taken his own life "under an insane impulse," so as not to relieve the company from liability on its policy.—*Charter Oak Life Ins. Co. v. Rodel*, U. S. Sup. Ct., C. L. N., Dec. 22, p. 105.

— **Life policy—Waiver of Forfeiture—Authority of agent.**—1. In this case the assured had forfeited his policy by the non-payment of the premium, and by going out of the permitted territory; *Held*, the premium having been subsequently paid to an agent of the company, he delivering his receipt therefor, signed by the secretary and countersigned by the manager and cashier of the local office, that the receipt, by the agent, of the premium was a waiver of the forfeiture for the non-payment of the premium due.—*Globe Mut. Life Ins. Co. v. Wolff, Executor*, U. S. Sup. Ct., Alb. L. J., Dec. 15, p. 435; *s. c.*, C. L. J., Dec. 21, p. 523; *s. c.*, C. L. N., Dec. 22, p. 105; *s. c.*, Rep., Jan. 2, p. 1.

— **Premium notes differ from promissory notes delivered as payment—Charter of company construed—Non-payment of premiums.**—The policy was for \$5,000, and an annual cash premium in equal sums was to be made for ten years, and premium notes falling due at the same time; The company agreed, in case of default in payment of premiums, to pay as many tenth parts of the whole amount insured as there had been annual premiums paid. The annual premiums were \$148.10 cash, and a premium note, with 7 per cent. interest, for \$110; Three cash annual premiums were paid, and interest on the first two premium notes; Default in further payments was made; The company insist that no complete annual premium had been made, and that the policy had become void before the death of the person whose life was insured; that the payment of part in cash, and the giving of a premium note for the balance, did not make a complete payment; *Held*, 1. As a rule, promissory notes are not considered as payment of preëxisting debts, but premium notes, not being payable at any given time nor in the usual way, are not, strictly speaking, promissory notes; They are more in the nature of receipts for money loaned; And the giving of each annual note, together with a cash payment of the required sum, will be considered a complete payment within the meaning of the policy, and will carry the risk through each year; 2. The general plan or scheme of the policy of this company is opposed to forfeiture for non-payment of premiums falling due after its issuance, and notes executed for parts of premiums do not essentially affect or modify its general plan; 3. Under this policy the plain inference is that the non-payment of premium does not forfeit the whole policy, but only that part not paid up.—*Northwestern Life Ins. Co. v. Little*, Sup. Ct. Ind., Am. L. Rec., January, p. 431.

— **Statute for the protection of policy-holders construed—Unimportant misrepresentations will not make policy void.**—1. The act of the legislature of the state of Missouri, of March 25, 1871, in respect of policies of life insurance, extends to all policies delivered in this state after the act went into effect; 2. Where the provisions of that act are in conflict with the provisions of the policy, the act controls the policy; 3. Whether the applicant for insurance may waive the benefit of the act, *quære*; but no such waiver arises by implication; 4. The act extends to warranties, as well as to representations; 5. The purpose and policy of the act expounded.—*White v. Connecticut Mut. Life Ins. Co.*, U. S. Cir. Ct., W. D. Mo., C. L. N., Dec. 1, p. 83; *s. c.* (with note), C. L. J., Dec. 7, p. 486; *s. c.*, Rep., Jan. 9, p. 39.

INSURANCE, MARINE.—**Insurance policy—Construed—Laches—Statute of limitations.**—1. The clause in the policy, "the risk to be suspended while vessel is at Baker's Island, loading," construed to mean while said vessel is at said island for the purpose of loading; 2. The court does not pass upon the question whether a libel could be filed in admiralty for a claim barred by the statute of limitations of the state, as it was not necessary to a decision

of the case.—*Reed v. Merchants', etc., Ins. Co.*, U. S. Sup. Ct., C. L. N., Dec. 22, p. 106.

INTERNAL REVENUE.—Construction of sec. 122 of act of Congress of June 30, 1864, as amended.—*Held*, that said section was not limited or affected by act of March 2, 1867, but continued in force after that time, and that defendant was liable to be taxed upon the interest of its bonds under the act of June, 1864, as amended.—*Lake Shore, etc., Ry. Co. v. Rose, Collector, etc.*, U. S. Sup. Ct., C. L. N., Dec. 1, p. 82.

—Construction of secs. 25, 57, and 96 of act of Congress of July 20, 1868.—Where a rectifier or wholesale liquor dealer knowingly omits to cause packages of distilled spirits containing more than twenty gallons each on his premises to be gauged, inspected, and stamped, in accordance with sec. 25 of the act of July 20, 1868, the property is liable to forfeiture under sec. 57 of the act, but the forfeiture imposed by sec. 96 does not apply; And it cannot be made to apply by any rules which the commissioner of internal revenue prescribes under sec. 2 of the act.—*United States v. Two Hundred Barrels of Whiskey*, U. S. Sup. Ct., Alb. L. J., Dec. 22, p. 452.

JUDGMENTS.—Action on foreign judgment—Conclusiveness of judgment.—1. In legal proceedings in Rhode Island, when the judgment of a court of a sister state is impleaded, the Rhode Island court will take judicial cognizance of the laws of such state; 2. The conclusiveness of a judgment, so long as it remains unreversed, not being affected by an appeal taken from it, according to the law of New York, *held*, that a judgment obtained in a court of the state of New York was, notwithstanding a pending appeal from it, a valid bar to an action in Rhode Island involving the same subject-matters; 3. Further, that final judgment would not be given in the Rhode Island suit pending the appeal in New York.—*Paine v. Schenectady Ins. Co.*, Sup. Ct. R. I., C. L. N., Dec. 8, p. 92.

—Bear interest from the date of their rendition.—1. Where a verdict is rendered in favor of the plaintiff, judgment upon which is delayed by the filing of a motion for a new trial by the defendant, upon the overruling of the motion the plaintiff is entitled to judgment for the amount of the verdict, with interest from the date of its rendition; 2. The rule applies as well to actions of tort as to those upon contracts.—*Gibson v. Cincinnati Enquirer Co.*, U. S. Cir. Ct., D. Ohio, C. L. J., Nov. 28, p. 446.

—Judgment of ecclesiastical court—Entitled to what credit—Authority of decisions of Federal court.—Civil courts cannot re-judge the judgment of an ecclesiastical tribunal in matters within the latter's jurisdiction; but the decision of such tribunal upon its own jurisdiction over the subject-matter is not exclusive; The control of the civil courts over the civil rights of the citizens cannot be ousted; A board of reference, under canon 4 of the Protestant Episcopal church, is an ecclesiastical court, and the civil courts may enquire into its organization and decide whether it has acted within the scope of its constitutional authority; The word "permanently," as used in the call of a rector, means indefinitely, and constitutes a contract that he should continue to hold the office of rector till one or the other of the parties desires to terminate the relation, and then to be terminated after reasonable notice and with the approval of the ecclesiastical authority of the diocese; Certain canons of the Episcopal church construed; The decisions of the State courts upon the rights of parties under state laws are final and binding upon the Federal courts, and a decision of the latter which is in opposition to the construction of state laws given by the highest court of the state will not be regarded by the state courts. *Watson v. Jones*, 13 Wall. 679, reviewed and dissented from.—*Perry v. Wheeler et al.* (with note), Ct. App. Ky., Am. L. Reg., January, p. 24.

—Lien of judgment where no damages assessed—Judgment by default—Searches—Omission of prothonotary to index and certify judgments—Guaranty—Surety—What constitutes sufficient pursuit of principal debtor to justify an action against the surety.—A judgment is a lien from the date of

its entry, though no liquidation of damages be filed; Plaintiffs brought an action against the principal debtor, and obtained judgment on August 1, 1874; No liquidation of damages was filed until the evening of September 2d; On the afternoon of September 2d defendant's real estate was sold; searches given by the prothonotary failed to show the entry of this judgment; *Held*, that the judgment was improperly omitted from the searches; *Held* further, that the plaintiffs had used sufficient diligence in pursuit of the principal debtor to entitle them to recover against the surety. *Sellers v. Barker*, 11 W. R. 344, followed.—*Bryan v. Eaton et al.*, Sup. Ct. Pa., W. N. C., Dec. 20, p. 493.

LANDLORD AND TENANT.—Receipt of rent as proof of tenancy.—Possession under invalid lease—Equity binding grantee of reversion.—1. The receipt of rent is not conclusive of the creation or ratification of a tenancy; it is evidence only, and it may be sufficient evidence thereof; 2. Where title to land is taken subject to a lease, and the lease is invalid, the grantee is entitled to immediate possession; 3. Where a lease has been granted without power, or not effectively, there is no equity binding the grantee of the reversion. Such a doctrine applies only where the vendor is liable on his covenant of title.—*Smith v. Widlake*, Ct. App., Com. Pl. Div. (Eng.), Rep., Jan. 12, p. 95.

LIEN.—Sheriff's sale—Distribution of proceeds of—Fund paid to committee of lunatic on account of a judgment conditioned for her support—Distribution of balance of fund after death of lunatic—Lien—Judgment conditioned for support of plaintiff—When a fixed lien—Discharge of, by judicial sale.—A, in consideration of \$1,300, executed to his mother, B, a judgment bond for \$2,600, conditioned for her support and the payment of an annuity of \$25 a year; After this bond was entered up, B became a lunatic; Subsequently A's real estate was sold by the sheriff under a junior encumbrance, but the proceeds were insufficient to pay all liens; The auditor appointed to distribute the proceeds of sale reported that \$1,394.62 should be impounded in court, to be used for the support of the lunatic, and that after her death any balance remaining should be paid to the persons legally entitled; The court confirmed this report, but, instead of impounding the \$1,394.62, directed that it be paid to B's committee; After B's death her committee filed a report charging himself with the \$1,394.62, and showing a balance remaining; *Held* (Sharswood, J., dissenting), that this balance should be awarded to the personal representatives of B, and not the creditors of A; *Seem* that the judgment conditioned for the support of B, being in the nature of a fixed lien, ought not to have been divested by the sheriff's sale, but that as the parties, the auditor, and the court below had treated it as so divested, it was too late for the appellate court to remedy the error.—*Rutty's Appeal*, Sup. Ct. Pa., W. N. C., Dec. 6, p. 445.

LIEN, MECHANIC'S.—The act of April 9, 1849, construed.—The act of April 9, 1849, extending the act of June 16, 1836, to certain corporations, does not authorize the filing of a mechanic's lien against the works of a gas company for pipes furnished for, and laid as, a distributing main of the company.—*McNeal et al. v. West Pittsburg Gas Co. et al.*, Sup. Ct. Pa., W. N. C., Dec. 27, p. 504.

—What constitutes an improvement lease—Mechanic's lien law—Act of April 28, 1840.—In order to constitute a lease an improvement lease, there must be an express contract by the lessee to build; A, the owner of an unimproved lot of ground, demised it to B for a term of years; The lease contained the following clause: "The said ground is hereby let for the purpose of building a hotel and opera-house, and for no other purpose;" *Held*, that these words did not constitute the lease an improvement lease; Where a tenant, in possession under a lease containing a mere license to build, contracts with material-men for the furnishing of materials, a lien filed by them will not bind the estate of the lessor; *aliter* if the lease is an improvement lease.—*Reid et al. v. Kenney et al.*, Sup. Ct. Pa., W. N. C., Dec. 20, p. 450.

IMITATIONS OF ACTIONS.—Effect of married woman's act upon the statute of imitations—Laches and limitation in equity.—1. Since the passage of the married woman's act of 1861, the statute of limitations runs against a married woman the same as against a *feme sole*. The expression in *Morrison v. Norman*, 47 Ill. 477, and *Noble v. McFarland*, 51 Ill. 226, to the effect that the married woman's act of 1861 has no effect upon the saving clause in the imitation law, is overruled; 2. Courts are not confined to the literal meaning of words in a statute, in its construction, but the intention may be collected from the necessity or cause of the act, and its words may be enlarged or restricted, according to its true intent; 3. Where a party, with full knowledge of all the facts, sleeps upon his rights for nineteen years without asserting his equities, and no sufficient excuse is shown for the delay, his laches will be such as to present a bar to relief in a court of equity; A court of equity will not enforce a stale demand; 4. In the absence of a statute of limitations the time in which a party will be barred from relief in a court of equity depends, to a certain extent, upon the facts of the particular case; but, when the statute has fixed the period of limitation barring the claim at law, courts of equity, by analogy, will follow the limitation provided by law: A court of equity will often treat a less period of time as a presumptive bar to a recovery.—*Castner et al., v. Walrod*, Sup. Ct. Ill., C. L. J., Nov. 16, p. 420.

—Running of statute of limitations not suspended by military orders extending the stay law—Effect of devise for payment of debts upon the statute.—The court cannot take judicial notice of the military orders extending the stay law; The object of the said orders was to extend only those provisions of the law which related to the stay of executions and the forced sales of property, and, therefore, if they had any validity whatever, they did not operate to suspend the running of the statute of limitations: A devise for the payment of debts will not affect the operation of the statute of limitation upon such debts, whether they be barred at the testator's death or not, unless the contrary intention on his part plainly appears.—*Johnston v. Wilson's Administrator*, Sup. Ct. App. Va., Va. L. J., December, 725.

QUOR SELLING.—Jurisdiction of police magistrate to condemn liquor—Is a criminal proceeding—Liquor cannot be replevied.—1. That the proceedings before the police magistrate, to condemn the liquor, were in the nature of criminal proceedings; 2. That ordinarily the trial of a criminal action cannot be arrested by the commencement of a civil action, either at law or in equity; 3. That if the police justice had jurisdiction, and the proceedings were regular, the liquor was in the custody of the law, and could not be replevied; 4. That, although the police justice was acting in a city under a special charter, he had the same jurisdiction as justices of the peace in cases under the liquor law; 5. That the information need not state that it is made by a "credible resident."—*Weir et al. v. Allen et al.*, Sup. Ct. Iowa, C. L. N., Jan. 5, p. 128.

ALPRACTICE.—Surgeons—Care and skill required—Negligence of patient—Average degree of skill, meaning of—Locality Operation performed against advice of surgeon.—Where a surgical operation is performed and the limb set becomes stiff or deformed, it is *prima facie* evidence of want of skill on the part of the surgeon: But, if the injuries were the result of inevitable accident, or were occasioned by the negligence of the patient himself, it is for the defendant to prove as a defence; It is not enough that a surgeon has exercised as much skill as is ordinarily exercised by surgeons in the locality in which he practises; There might be but few practising in a given locality, all of whom might be quacks, and to say one of them possessed as much skill as the others would not be a defence; Where a surgeon advises a patient that a given operation is unnecessary and improper, and is opposed to its performance, and the patient insists that it shall be done, there is no principle upon which the former can be held liable in damages on the ground that the operation was improper and injurious.—*Gramm v. Boeher*, Sup. Ct. Ind., Am. L. Rec., January, p. 410.

MANDAMUS.—Will be refused, when.—Where a petition was filed for a writ of *mandamus* to a county clerk, requiring him to deliver to the petitioner the books and blanks prepared by him for the assessment of the real and personal property of the town, petitioner claiming to be assessor of said town, elected at an annual election, and where the board of appointment determined that there had been a failure by said town to elect an assessor, and thereupon duly appointed an assessor, to whom the county clerk delivered all the said books and blanks, it was *held* that there was here no proper case for the award of a writ of *mandamus*; that the county clerk had once acted in delivering the books and blanks to one who was at least assessor *de facto*, and that he should be protected in so doing; that there is no obligation of law to bind him further, having already discharged the full measure of his statutory duty in this respect.—*People v. Lieb*, Sup. Ct. Ill., Ch. L. J., Vol. 1, No. 3, p. 145.

MARRIAGE AND DIVORCE.—*Lex domicilii* and marriage.—The petitioner and respondent, Portuguese subjects and first cousins, came with their parents to reside in England in 1858; In 1866 they went through the civil form of marriage before the registrar of the district of the city of London; They were both infants at the time of the ceremony, and they went through the form at the earnest solicitation of their parents, for the purpose of protecting some property in Portugal; The marriage was never consummated; In 1873 they returned to Portugal, and continued to reside there; By the law of Portugal the marriage was invalid, first cousins being within the prohibited degrees of consanguinity; The wife brought a suit in the English court praying for a decree of nullity, on the ground that the marriage was void by the law of Portugal; *Held* (reversing the decision of Sir R. J. Phillimore), that the petitioner and respondent, as domiciled Portuguese subjects, carried with them to England the incapacity to contract marriage with one another inflicted on them by the law of Portugal; that the English court was bound to recognize this incapacity; and that there must accordingly be a decree of nullity. *Simonin v. Mallac*, 2 Sw. & Tr. 67, distinguished.—*Sottomayor v. De Barros*, High Ct. App. (Eng.), Alb. L. J., Dec. 29, p. 469.

— **Marriage**—Presumptions—Illicit cohabitation—Marriage of slaves.—In a case involving the question of marriage, where there is no impediment to marriage, and the connection between the parties was illicit in its commencement, it will be presumed to continue to be of the same character; and, in order to overcome that presumption, it will be necessary to adduce other evidence than that of the cohabitation of the parties to establish their marriage; If, after the birth of a person claiming to be the legitimate child of his parents, though born as a bastard, there be no cohabitation of his father and mother, the latter assuming the name of the former, and the parties treat each other as man and wife, and treat the claimant as their child, and they are treated as, and reputed to be, man and wife by their friends and acquaintances, these are facts proper to be submitted to the jury, from which marriage may be inferred, notwithstanding the original illicit connection between the parties: The presumption of marriage will not arise from the cohabitation of a man with a woman if, during her life and without any proof of divorce, he marries another woman; Under the law of this state the marriage of a slave without the consent of the master was not actually void.—*Jones v. Jones*, Ct. App. Md., Am. L. Rec., January, p. 895.

MORTGAGES.—Chattel mortgage of property to be subsequently acquired.—A mortgage of personal property to be subsequently acquired conveys no title to such property, when acquired, which is valid against the mortgagor or his voluntary assignee, unless after acquisition possession of such property is given to the mortgagee, or taken by him under the mortgage.—*Williams, Admr., v. Briggs*, Sup. Ct. R. I., Alb. L. J., Dec. 1, p. 887.

— **Consideration**—**Estoppel**—**Declaration of no set-off**—**Purchaser for value without notice**—**Married women**—**Evidence.**—In November, 1868, C., a married woman, being jointly with her husband imprisoned on a charge of murder, joining with him in executing to S. a mortgage of her property to secure

a bond executed at the same time by her husband for \$10,000; On the same day the bond and mortgage were assigned to B., who was their counsel, they executing a declaration of no set-off; In January, 1869, C. was acquitted; In February, 1869, B., for \$9,200, assigned the bond and mortgage to M., a *bona fide* purchaser for value, C. executing and acknowledging a second declaration of no set-off; In a suit by M. upon the mortgage, C. offered to prove that she executed the mortgage at the request of B., who promised not to sell it, but to hold it until she was acquitted, as security for fees and for legal expenses assumed by him, of which he promised to render her an account; that she signed the second declaration of no set-off in ignorance of its contents, and upon the representation that it was a policy of insurance; that B. has not rendered her an account, and was largely indebted to her for other moneys received by him; *Held* (affirming the judgment of the court below), that this evidence was inadmissible, no notice of the facts alleged having been brought home to M.—*Twitchell v. McMurtrie*, Sup. Ct. Pa., W. N. C., Nov. 22, p. 419.

— Determination of what property is included within the mortgage at time of foreclosure under a clause covering property to be acquired after execution of the mortgage.—1. The appearance of counsel specially for a railroad corporation, and moving to dismiss the petition of an individual creditor for the appointment of a receiver of its property, do not preclude him from subsequently appearing for the trustee of the bondholders in proceedings to foreclose mortgages of the company; 2. Upon supplemental bill in chancery no process of subpoena need issue unless new parties are brought in; A rule upon parties already served to answer the supplemental bill is sufficient; 3. Where a corporation is insolvent and has no funds at the place where its bonds are payable, demand of payment at such place need not be made before suit brought to foreclose its mortgages executed to secure the bonds; 4. A mortgage of a railroad corporation which in terms covers "all the following present, and in future to be acquired, property" of the company, naming in the description of such property its engines, cars, and machinery, carries, not only those in existence at the date of the mortgage, but such as take their place or are subsequently added to them by the company, and exist at the time of the foreclosure.—*Putnam et al. v. Bill*, U. S. Sup. Ct., C. L. N., Dec. 8, p. 91.

— Mortgage foreclosure—Instalments—Default in payment of first—All due.—Five promissory notes, payable in as many successive years, were given by defendant to plaintiff, secured by mortgage conditions that, "if default should be made in the payment of said sums of money, or any part thereof, principal or interest, * * * then the whole indebtedness shall become due;" Ten days after the first note became due the defendant paid it in full to plaintiff's agent, and also paid the interest upon the others, but plaintiff refused to accept the money only as part payment of the amount due, and brought suit to foreclose mortgage for all; *Held*, the mortgagees had the right to foreclosure.—*Stout v. Bean et al.*, Sup. Ct. Iowa, West. Jur., December, p. 694.

— Satisfaction of—Full payment of debt required—A tender not sufficient.—Where mutual acts are to be done by two parties at the same time, and the right of each depends upon the performance of the other, either may tender performance of his part on condition of the simultaneous performance of the other's part, and such tender will be good; But, when one party is bound to perform an act not dependent on any act of the other, a tender, to be valid, must be without conditions; A tender of the amount due upon a promissory note payable at a bank, made upon the condition that such note shall be surrendered, is sufficient, but, if the note be secured by a mortgage on real estate, a tender of the amount upon the condition that such mortgage shall be released or cancelled is insufficient; Section 5 of the Indiana "act concerning mortgages," approved May 4, 1852 (2 Rev. Stat. 1876, p. 333), requires a mortgagee of lands to enter satisfaction thereof only upon his having received, not a tender merely, but full payment of the debt secured thereby.—*Story v. Krewson et al.*, Sup. Ct. Ind., Am. L. Reg., January, p. 56.

— **Waste of mortgagor after foreclosure.**—1. After a mortgage foreclosure of sale of real property, and before issue of the sheriff's deed thereon, removal by the mortgagor of *fixtures* is *waste*, for which the purchaser may recover damages; 2. In an action for such alleged waste it was error to nonsuit the plaintiff after proof that the mortgaged property was a blacksmith-shop, and that the articles removed by the defendant mortgagor included door-locks, and certain irons embedded in the masonry of the forge-chimney, and in removing which the chimney was broken; these articles being presumably part of the realty, and the breaking of the chimney being of itself an act of waste.—*Lackas v. Bahl et al.*, Sup. Ct. Wis., C. L. N., Dec. 29, p. 114.

MUNICIPAL CORPORATION.—Liability for flooding caused by street improvements.—Where a city, by the manner in which it grades a street, collects the water from a wide area and empties it, charged with the street filth, upon plaintiff's adjoining land, and into his cellar and well, it is liable for the damage done plaintiff thereby.—*Inman v. Tripp*, Sup. Ct. R. I., Alb. L. J., Jan. 5, p. 12.

NEGLIGENCE.—Action against city for injuries caused by a licensed exhibition of wild animals, through carelessness of city's agents.—Where a city licenses an exhibition of wild animals (in this case two large bears), knowing that it is calculated to frighten horses and endanger the lives and property of persons travelling in the streets, and the officers and agents of the city knowingly and carelessly allow one of its streets to be obstructed by such exhibition, and a person travelling with a team along such street is injured in consequence of the team becoming thereby frightened and unmanageable, the city is liable in damages.—*Little, Admr., v. City of Madison*, Sup. Ct. Wis., C. L. N., Dec. 15, p. 103; *s. c.*, Rep., Jan. 9, p. 59.

— **Contributory negligence.**—1. Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done; The essence of the fault may lie in omission or commission; One who by his negligence has brought an injury upon himself cannot recover damages for it, but where the defendant has been guilty of negligence also, in the same connection, the result depends upon the facts; The question in such cases is (1) whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or (2) whether the plaintiff himself so far contributed to the misfortune, by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened; In the former case the plaintiff is entitled to recover; in the latter, not.—*Baltimore, etc., R. R. Co. v. Jones*, U. S. Sup. Ct., C. L. N., Jan. 5, p. 121.

— **Contributory negligence.**—Party acting under the direction of the company's servant not guilty of contributory negligence.—F. called with his team at defendant's depot for freight; The company's agent directed him to a position at the station, within a few feet of the track, informing him that no train would pass for half an hour; A train came within five minutes, and one of his horses was injured; *Held*, that he was not guilty of contributory negligence.—*Allegheny Valley R. R. Co. v. Findley*, Sup. Ct. Pa., W. N. C., Nov. 29, p. 438.

— **Injuries through negligence of fellow-servant.**—A car repairer whose usual duties were in the shop of the company, into which ran one or more tracks, and upon which cars were run in when needing repairs, was at work upon a car which, by the orders of the person in charge of the shop, had not been run into the shop, but upon the "dead track" outside of the shop (but in the yard), where cars not in use were frequently left standing; While thus engaged he was injured by the negligence of the engineer in charge of the switch engine of the yard; *Held*, that there could be no recovery against the company.—*Valdez v. Ohio, etc., Ry. Co.*, Sup. Ct. Ill., C. L. J., Nov. 16, p. 426.

— Injury to employes—Latent defects in machinery—Duty of railroad company.—It is the duty of a railroad company to use due care and skill in providing safe machinery for its employes to operate, and to adopt and apply all reasonable and usual tests to discover defects in its machinery, but it is not responsible for injuries received by its employes through *latent* defects of machinery, where due care has been taken to provide against such defects.—*Smith v. Chicago, etc., Ry. Co., Sup. Ct. Wis., C. L. J., Nov. 16, p. 424.*

— Liability of railroad company over which a second company has right to run its trains—Contributory negligence.—1. A railway corporation, owning the road and franchise over which another railway corporation has a right under contract to run and operate its trains, is liable in damages for injuries resulting from the negligent use of the said track and franchise by the servants of the second company; 2. A passenger leaving his seat in a passenger car (there being an abundance of room) while the train is in motion, and going into the baggage car, where he is injured by falling baggage, upon the car being overturned, is guilty of contributory negligence, and no action lies for the injury.—*Peoria, etc., R. R. Co. v. Lane, Sup. Ct. Ill., C. L. J., Nov. 30, p. 462.*

— Railroad crossing—Care required in crossing.—That, if a railroad crosses a common road on the same level, those travelling on either have a legal right to pass the point of crossing, and to require due care on the part of those travelling on the other, to avoid a collision; These mutual rights have respect to other relative rights subsisting between the parties; From the character and momentum of a railroad train, and the requirements of public travel by means thereof, it cannot be expected that it shall stop and give precedence to an approaching wagon to make the crossing first; it is the duty of the wagon to wait for the train; The train has the preference and right of way, but it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way; Such warning must be reasonable and timely, but what is reasonable and timely must depend on many circumstances; It cannot be such if the speed of the train be so great as to render it unavailing; The speed of a train at a crossing should not be so great as to render unavailing the warning of its whistle and bell, and this caution is specially applicable when their sound is obstructed by winds and other noises, and when intervening objects prevent those who are approaching the railroad from seeing a coming train; In such cases, if an unslackened speed is desirable, watchmen should be stationed at the crossing.—*Continental, etc., Co. v. Stead, U. S. Sup. Ct., C. L. N., Jan. 5, p. 121.*

NATIONAL BANKS.—Taxation on shares of national bank stock.—1. That the rate of taxation upon the shares of national banks should be the same, or not greater than upon the moneyed capital of the individual citizen which is liable to taxation; 2. The court states the binding effect of the decisions of the supreme court of a state in construing the statutes of the state relating to taxation; 3. That it was not intended by the act of Congress to curtail the state power on the subject of taxation; It simply required that capital invested in national banks should not be taxed at a greater rate than like property similarly invested; That particular persons or particular articles are relieved from taxation is not a matter to which either class can object.—*A. G. Adams & Co. et al. v. The Mayor, etc., U. S. Sup. Ct., C. L. N., Dec. 15, p. 98.*

NUISANCE.—Action for special damages on account of a nuisance to an individual's property.—A person renting a house to be used as a bawdy-house, or who knowingly allows it to be so used, is liable, at the suit of an adjoining owner, for the special damage caused by the depreciation in value of his property from the existence of a nuisance, over and above the wrong and injury done the general public.—*Givens v. Van Studdiford, St. Louis Ct. App., C. L. J., Jan. 4, p. 6.*

OFFICER.—Legislature cannot remove officer whose term is fixed by the constitution of the state.—Where the term of a public office is fixed by the constitution, the legislature cannot directly or indirectly remove the incum-

bent; The inability to do so proceeds rather from the absence of legislative power than from any idea of a contract between the incumbent and the state; It is immaterial that the constitution has not prescribed the number of officials who are to hold for the prescribed term, but has left the number discretionary with the legislature; When by law provision has been made for a certain number, and they have been lawfully chosen, they are protected for the term, as they would have been had the constitution itself indicated how many there should be; Under such circumstances a reduction of the number of officers can only take effect at the end of the term of existing incumbents; To take from an officer the authority to perform the duties of the office is equivalent to a removal, and, consequently, is incompetent when a direct removal is forbidden; Where, therefore, the term of office of the district attorneys was prescribed by the constitution, and the statute had fixed the number of these officers at thirteen, with a salary of \$1,200 each, and the legislature afterwards reduced the districts to eleven, and provided that two of the incumbents should act only in the counties of their residence, respectively, and only in the absence of the district attorney assigned to the district embracing such county, and should receive a salary of \$100 each only, *Ac-d*, that this action was void, as an indirect attempt to deprive two of the incumbents of their offices; and, consequently, those incumbents were entitled to the salaries previously established.—*Fant v. Auditor of Public Accounts* (with note), Sup. Ct. Miss., Am. L. Reg., Dec., p. 737.

PATENTS.—Infringement—Claim—Province of courts.—That a patentee cannot show that his invention is broader than his claim; If broader, he must be held to have surrendered the surplus to the public; That the courts have no right to enlarge a patent beyond the scope of its claim as allowed by the patent office, or the appellate tribunal to which contested applications are referred; As patents are procured *ex parte*, the public is not bound by them, but the patentees are.—*Keystone Bridge Co. v. Phoenix Iron Co.*, U. S. Sup. Ct., C. L. N., Dec. 15, p. 99; *s. c.*, Rep., Jan. 16, p. 64.

— Reissue—Degree of invention necessary to support patent.—1. Features of a machine neither claimed nor described as of the invention of the patentee in the original patent, and having no necessary relation to the features so described and claimed, but shown in the drawing and model of the original patent, may be claimed in a reissue; 2. Such claims held to be valid, and sustained; If there is anything, no matter how slight, in a patented device, and the exact construction of the device is novel, this is sufficient to sustain the patent; The court will not enquire into the extent of the utility; 3. The suggestion in a patent that a device may be made in sections of one or more matrices each will not invalidate a subsequent patent to a different patentee for the device when made in sections of one matrix each, where it appears that some advantage is obtained by making them in single sections not pointed out in the former patent.—*Miller, etc., Co. v. Dubrul*, U. S. Cir. Ct., S. D. Ohio, C. L. J., Nov. 30, p. 467.

PERSONAL PROPERTY.—Rights of a finder of lost property.—A bought an old safe, and afterward offered it to B, who refused to purchase it; It was then left with B for sale, B having permission to use it; B found between the outer casing and the lining a roll of bank-bills belonging to some person unknown, whereupon A first demanded the money, and then demanded the safe and its contents as they were when B received them; The safe was returned, but the money retained by B; *Held*, that, as against A, B was entitled to retain the money; The finder of lost property is entitled to it as against all the world except the real owner, and ordinarily the place where it is found is of no consequence.—*Durfee v. Jones*, Sup. Ct. R. I., Alb. L. J., Nov. 24, p. 368.

PLEADING.—Negligence—Sufficiency of averment of breach of duty.—It is not sufficient to state simply that the defendants have been guilty of negligence; the facts creating a duty on their part must be set forth, and a breach of that duty specifically shown.—*Breman v. Guardians, etc.*, Ct. Q. B. (Ireland), Rep., Jan. 9, p. 64.

POWERS.—Deed—Execution of power—Sufficient reference to power.—As to purchasers for value, the rule for the execution of a power to sell, contained in a will, is that an intent apparent on the face of the deed to dispose of all of the estate will be deemed a sufficient reference to the power to operate an execution of it.—*Campbell et al., v. Johnson*, Sup. Ct. Mo., Rep., Jan. 16, p. 71.

PRACTICE.—Challenges in civil and criminal cases—Negligence—Province of court—Province of jury—Instructions—When all the evidence not in bill of exceptions.—1. *Held*, that in civil cases each side to the suit, without reference to the number of plaintiffs or defendants, are entitled to but three peremptory challenges; 2. That, in criminal proceedings, each person, when arraigned, whether alone or with others, is to have the challenges specified; 3. The court, after stating the duty of the company, say it was a question for the jury to determine whether there were brakemen enough on the train for ordinary purposes, and not for the court to instruct whether there were a sufficient number; That a mere preponderance of negligence on the part of the defendant will not authorize a recovery where both parties are guilty of negligence; that of the plaintiff must be slight when compared with that of the defendant, and his must be gross; 5. When it should show that there was evidence tending to prove a particular fact, and when it should contain all the evidence; 6. The court states under what circumstances a city will be liable for an injury caused by a defective sidewalk; 7. That this was a case for the jury to compare the negligence of both parties, and say whether, when so compared, that of the deceased was slight and that of the railroad gross.—*Schmidt v. Chicago, etc., R. R. Co.*, Sup. Ct. Ill., C. L. N., Nov. 17, p. 67.

—Errors and appeals—Error lies only to a final judgment.—The refusal of the court below to strike off an appeal from the judgment of a justice is not such a final judgment as will support a writ of error.—*Barclay v. Colwell*, Sup. Ct. Pa., W. N. C., Nov. 29, p. 440.

—*Mandamus* to compel the allowance of an appeal.—The Supreme Court of the United States has power, in an original proceeding, to issue a *mandamus* to compel the allowance of an appeal; When this power will be exercised.—Original *ex parte* The North and South Alabama R. R. Co., U. S. Sup. Ct., C. L. N., Nov. 17, p. 66.

—Sheriff disqualified to summon a jury, when—Defendant testifying for co-defendant—Evidence upon defence of *alibi*.—1. The interest which disqualifies a sheriff to act in summoning talesmen to complete a jury need not be an interest pecuniary, or one of relationship, but may be an interest arising from his having taken an active part in the prosecution of the defendants; 2. Where, under the statute, defendants being tried jointly for the same offence may testify for each other, the one so testifying for his co-defendant is subject to the same liabilities as a witness as if he were not on trial, and the state may show that his general moral character is bad, for the purpose of affecting his credibility as a witness, although he may not have offered to put the same in issue himself; The statute of Iowa, making the rules of evidence the same in criminal cases as in civil, so far as applicable and not otherwise provided, making no exception; 3. The doctrine of the Webster Parkman case, that, where the defence is an *alibi*, the defendant must establish it by a preponderance of evidence, doubted; For the purposes of this case, however, it may be conceded to be correct; but an instruction to the effect that the jury should be "fully satisfied" of the truth of the *alibi* requires of defendants a higher degree of proof than a preponderance, and is clearly erroneous.—*State v. Hardin et al.*, Sup. Ct. Iowa, C. L. N., Nov. 17, p. 66.

—*Supersedeas* bond on appeal to United States Supreme Court.—Determination of who should be parties to *supersedeas* bond, and who shall be cited on appeal from a decree foreclosing a mortgage upon a railroad.—*Ketchum et al. v. Duncan et al.*, U. S. Sup. Ct., C. L. N., Jan. 5, p. 122.

PUBLIC LANDS.—Mexican land grants.—1. Under the Mexican law, when a grant of land is made by the government, a formal delivery of possession to the grantee by a magistrate of the vicinage is essential to the complete investiture of title; This proceeding, called in the language of the country the delivery of judicial possession, involves the establishment of the boundaries of the land granted when there is any uncertainty with respect to them; A record of the proceeding is preserved by the magistrate, and a copy delivered to the grantee; 2. Unless there is something in the decree of the tribunals of the United States, confirming a claim to land under a Mexican grant, otherwise limiting the extent or form of the tract, the boundaries thus established should control the officers of the United States in surveying the land; 3. A survey of a claim thus confirmed, made by a surveyor-general of the United States, is inoperative, if contested, until finally approved by the land department at Washington; 4. Where a quantity of land in California was granted by the Mexican government within boundaries embracing a larger amount, in the possession of which larger amount the grantee was placed, he is entitled to retain possession of the entire tract until the quantity granted is segregated by the officers of the government and set apart to him, and he may maintain ejectment for the entire tract, or any portion of it, against parties claiming possession under the preëmption laws of the United States; 5. Lands claimed under Mexican grants in California are excluded from settlement under the preëmption laws so long as the claims of the grantees remain undetermined by the tribunals and officers of the United States; *Van Reynegan et al. v. Bolton*, U. S. Sup. Ct., C. L. N., Dec. 15, p. 98.

RAILROADS.—Carrying baggage—Freight—Passenger.—A railroad company is not obliged to carry as baggage the trunk of one who does not go by the same train; Upon receiving the trunk of such person to be forwarded it is received as freight, and the duties and liabilities of a common carrier attach, with the right to a reasonable compensation for transportation.—*Graffam v. Boston*, etc., R. R. Co., Sup. Ct. Me., Rep., Jan. 9, p. 44.

— Liability as carriers for negligence—Clause in contract intended to limit liability.—Plaintiff shipped animals by railroad under a contract whereby he agreed to release and discharge the railroad company "from all claims, demands, and liabilities of every kind whatsoever, for or on account of, or connected with, any damage or injury to, or loss of, said stock, or any portion thereof, from whatsoever cause arising;" *Held*, that the contract did not release the company from liability for loss resulting from the negligence of its servants; A carrier of animals is excused from liability for loss caused by the inherent tendencies or qualities of the animals, but beyond this the common-law liabilities exist against him the same as against the carrier of any other kind of property.—*Mynard v. Syracuse*, etc., R. R. Co., Ct. App. N. Y., Alb. L. J., Dec. 29, p. 471.

— Rights of ticket-holder on train—Conductor's check—Special check—Right to eject passenger from train—When once ejected, cannot, by paying, take same train.—1. A passenger who has a ticket gets on a train and receives from the conductor a red check, and, desiring to stop over at a station, gets off the train without obtaining any stop-over check as directed on the red check, and on the next day gets on the train at the same station he got off, and at the same hour; *Held*, upon being requested by the conductor to pay his fare, and his failure so to do, that he may be ejected from the train by the conductor, and that, having once been properly ejected from a train for not paying his fare, he cannot, by paying his fare, again enter the same train; 2. When a passenger improperly refuses to pay his fare when demanded by the conductor, as agent of the railroad company, he becomes a trespasser, and is not entitled to the rights and privileges of a passenger.—*Stone v. Chicago*, etc., R. R. Co., Sup. Ct. Iowa, West. Jur., November, p. 653; s. c., C. L. N., Nov. 24, p. 78.

— Roads and bridges—Act of March 27, 1848—Liability of railroad companies for repairs to bridges, etc.—Wherever a railroad company, by chang-

ing the line of a public highway for its own purposes, creates a necessity for a bridge where no such necessity before existed, the company is liable, not only for the original cost of construction, but also for such repairs and reconstruction in the future as may be required to answer the public needs.—*Pennsylvania R. R. Co. v. Borough of Irwin*, Sup. Ct. Pa., W. N. C., Jan. 3, p. 518.

REAL PROPERTY.—Joint tenancy—Act of March 31, 1812.—The act of March 31, 1812, does not prohibit the creation of a joint tenancy; Such an estate will not, however, be inferred in the absence of apt words creating it; A testatrix devised her estate to her two daughters, "jointly and equal; or, if one should die, the survivor to hold the property in full;" *Held*, that they took as tenants in common.—*McVey v. Latta et al.*, Sup. Ct. Pa., W. N. C., Jan. 3, p. 524.

—Liability for acts impairing lateral support.—When, by reason of the working out of the mines under lands lying between the lands of A and those of B, A cannot work the mines under his lands without causing a subsidence of B's lands and buildings erected thereon, B cannot restrain A from working his mines up to his own boundary if the intervening land would, had it remained in its natural state, have sufficed to support B's lands and buildings.—*Mayor, etc. v. Allen*, High Ct. App. (Eng.), Alb. L. J., Dec. 8, p. 410.

RECEIVER.—State courts and receivers appointed by Federal courts.—1. S., a county treasurer, filed his petition in the district court against a railroad company, and B., the receiver of said company, appointed by the circuit court of the United States, to recover the taxes levied upon said company for the year 1874; The petition alleged the appointment of the receiver and his possession and control of the road; Without, so far as the record discloses, the issue or service of any process, the company and receiver filed a joint answer, in which they admit that a portion of the taxes are properly chargeable against the company, and consent that judgment may be rendered against them in this action for that amount; and also allege the appointment of the receiver by the United States circuit court, that he is not amenable to the process of the district court, and pray that, as to him, the suit may be dismissed; The district court decided that it had jurisdiction, and rendered judgment against the receiver; *Held*, no error; 2. While it may be conceded that a court appointing a receiver may draw to itself all controversies to which the receiver is a party, or which affect the property under his control, yet it does so only by direct action upon parties by way of injunction or proceedings as for contempt, and the appointment in no manner affects the ordinary jurisdiction of other tribunals; 3. An allegation, therefore, in an answer, that the defendant is a receiver duly appointed by another court, raises no question as to the jurisdiction of the court in which the answer is filed; 4. Under the general tax-law the valuation of real estate is fixed in the first place by the assessor, and not by the owner, and may thereafter be changed by the board of equalization at a regular meeting, of which legal and public notice is given, and by the law of 1874 the assessment and valuation of railroad property was to be the same as that of other property.—*St. Joe, etc., R. R. Co. et al. v. Smith County Treasurer*, Sup. Ct. Kan., Alb. L. J., Dec. 8, p. 408.

REPLEVIN.—Set-off—Measure of damage in.—In replevin the question is one of title to the goods; if the taking was unlawful, the plaintiff is entitled to recover, and the defendant cannot, by way of set-off, claim a sum alleged to be due him by plaintiff as the price of the goods in dispute, which defendant had previously sold to plaintiff on credit; *Semble* that, where the goods have been retained by counter-bond, the measure of damage is the market value of the goods, at their highest price between the time of taking and the delivery to the defendant by the sheriff, with interest thereon from that date until the date of verdict.—*Jennings v. McKay*, Sup. Ct. Pa., W. N. C., Nov. 22, p. 421.

— Title by possession only—Sufficient as against one claiming title through an illegal transaction—Lottery ticket.—A party claiming title to personality through an illegal transaction cannot resist an action by one whose title is bare possession only; A. was the owner of a ticket in a lottery, which he passed over to B.; The evidence was conflicting as to whether the transaction was a gift of the ticket and of whatever it might draw, or whether it was handed to B. to obtain what it might draw, as agent for A.; The ticket drew a pair of horses, of which B. obtained possession; A. transferred all his right to K., who went to B., and by threats and menaces succeeded in acquiring possession of the horses; In an action of replevin by B. against K., *held*, that B. could recover.—*Kistner v. Newhouse*, Sup. Ct. Pa., W. N. C., Dec. 6, p. 462.

SALES. —Property in a chattel does not pass unless such is the clear intention of the parties.—The property in a chattel passes according to the intention of the parties; That is a question of fact for the jury, unless it is plain by admitted facts, that the law will justify a finding but one way; Where there is a contract for the sale of a smaller quantity of goods from a greater mass of like quality (corn), which remains in the possession of the seller, without selection or appropriation, the contract is executory, and the property does not pass unless there be a clearly expressed intention to make the sale complete without further action by the parties.—*Hires v. Hurff* (with note), Sup. Ct. N. J., Am. L. Reg. January, p. 11.

— Measure of damages on breach of vendor's warranty.—1. The measure of damages for breach of the vendor's warranty is the difference between the actual value of the article and the value which it would have possessed if it had been as warranted; and the price paid, or contracted to be paid, is merely evidence of the latter value; 2. Notes given for a part of the contract price are not payment in this state, unless it is expressly so agreed; In a suit upon one of several such notes it will be presumed, in the absence of evidence, that those not yet due or paid are still in the vendor's hands; and it is error to render judgment for the defendant for the excess of his damages, for breach of warranty, over the note in suit. *Aultman & Co. v. Jett and others*, 42 Wis.; 3. Whether the trial court in such a suit can require plaintiff, as a condition of recovery, to surrender the outstanding notes, is not here decided.—*Aultman & Co. v. Hellrenugton*, Sup. Ct. Wis., C. L. N., Dec. 8, p. 96.

— Warranty of soundness will not be implied, when.—The vendor of an article sold for a particular purpose does not impliedly warrant it against latent defects to him unknown, and caused by the unskilfulness or negligence of the manufacturer or previous owner, except when the sale is, in itself, equivalent to an affirmation that the article has certain inherent qualities inconsistent with the alleged defects; Thus, when defendant, a machinist and founder, sold a piece of wrought-iron shafting, of which he was not the maker, but which he turned and prepared for the reception of pulleys, and which he supposed to be sound, to be used in running machinery in a carriage-shop, and the shaft, upon being put to the described use, broke because of a flaw and an imperfect weld, it was *held* that there was no implied warranty of its soundness.—*Bragg v. Morrill*, Sup. Ct. Vt., Am. L. Reg., December, p. 748.

SPECIFIC PERFORMANCE.—Complainant must show that he has not been in default.—In equity a complainant suing for specific performance must show that he has not been in default; Hence, when a contract for the sale of land provided for the payment of the "balance of the purchase-money" at a time certain, and the court, from evidence which was conflicting, found that the time had been extended by agreement to a day certain, and the vendee did not then pay, nor did he claim that he had ever tendered the price and demanded a deed, the court dismissed the vendee's bill for specific purposes; *Seem* that in this country the tender of a deed by the vendee is unnecessary in order to put the vendor in default, as the deed is to be prepared by the vendor.—*Doyle v. Harris*, Sup. Ct. R. I., Alb. L. J., Dec. 22, p. 460.

STATUTES.—Construction of—Repeal by implication—Amendatory act—Constitutional requirement—Original legislation.—A constitutional provision that no act shall be amended by striking out words and inserting others in lieu thereof, but that the act or part of act amended shall be published in full, does not apply to repeals by implication or against original legislation, the effect of which would be to alter or modify previous laws; it refers to such acts only as are in terms amendatory in their character.—*State ex rel. Speck v. Geiger*, Sup. Ct. Mo., Rep., Jan. 16, p. 71.

TELEGRAPH COMPANIES.—Misdelivery of message—Company's liability to recipient.—Before Bramwell, Brett, and Cotton, L. JJ.; The recipient of a telegram, misdelivered to him through the negligence of a telegraph company, cannot, in the absence of an express contract with the company, maintain an action against them to recover damages for a loss occasioned by his having acted on the telegram; Plaintiffs carried on business as merchants at Valparaiso, and were a branch house of a firm at Liverpool; Defendants, a telegraph company, through the negligence of their agent, misdelivered a telegraph message to plaintiffs; The message purported to be from plaintiffs' Liverpool house, and to be a large order for barley; but in fact it was not from the Liverpool house, nor intended for plaintiffs; Plaintiffs executed the supposed order, and, having suffered a heavy loss in consequence, claimed damages against defendants; On demurrer to statement of claim setting out the above facts, it was *held* (affirming the decision of the common pleas division) that plaintiffs were not entitled to maintain their action, as there was no contract between themselves and defendants, nor any duty upon defendants to transmit messages correctly.—*Dickson et al. v. Reuter's Telegraph Co.*, Ct. App. (Eng.), C. L. N., Dec. 15, p. 100; *s. c.*, Alb. L. J., Dec. 15, p. 429; *s. c.*, Rep., Jan. 16, p. 92.

TROVER.—When maintainable between joint owners—Destruction of the property by one joint owner—What is equivalent to destruction.—The rule that one joint owner of a chattel cannot maintain trover against his co-owner for the detention of possession, or sale of the property, is restricted to cases in which the property remains in specie; If the property be destroyed, or be so dismembered as to be rendered unfit for the purpose for which it was designed, trover by a joint owner will lie; The defendant, being a joint owner with plaintiffs of the machinery and "rig" of an oil well, and being in sole actual possession thereof, abandoned the well, dismantled the engine and machinery, sold the boiler, and removed the tubing and remainder of the rig out of the county; *Held*, that such action was a virtual destruction of the property, by reason whereof his co-owners could maintain trover against him.—*Given v. Kelly et al.*, Sup. Ct. Pa., W. N. C., Nov. 29, p. 483.

TRUSTS.—Active and executed—Separate use—Trust of income for life, remainder over—When determinable—Powers—Execution of power of appointment—Antecedent will inoperative.—F. and his wife, E. L. F., executed a deed of trust of the wife's estate as to one-third, in trust "to pay over the net rents, issues and profits, interests, and income thereof, for and during the lifetime of the said E. L. F., to such person or persons as she, the said E. L. F., whether covert or sole, shall appoint; *provided*, that such rents, issues and profits, interests, and income shall not be liable to her debts, contracts, or engagements, or the debts, contracts, or engagements of her present or any future husband; and from and immediately after the decease of the said E. L. F., then to grant, convey, assign, transfer, and set over the said one full, equal, undivided third part of the said trust estate hereby granted and assigned, unto such person or persons, and for such use or uses, estate and estates, as she, the said E. L. F., shall, whether covert or sole, by her last will and testament, or any instrument in the nature thereof, direct, limit, and appoint;" and, in default of appointment, to convey the said estate "to such person or persons, and in such proportions as they would be entitled to under the present intestate laws of the state of Pennsylvania if the said E. L. F. had died intestate and survived her husband." F. and E. L. F. were subsequently divorced; *Held*, that the trust was not terminated

by the divorce, but continued as an active trust to preserve the *corpus* of the estate for the appointees or heirs; The said E. L. F. made her will in 1869, purporting to be "in pursuance of all laws, authorities, and powers enabling me to make a last will, or appointment in the nature thereof." By the deed of trust above mentioned, made in 1875, the testatrix reserved to herself the power of appointment by will, in the terms above set forth, and afterwards died in the same year, unmarried; *Held*, that the will was not a valid execution of the power; Dunn and Biddle's Appeal, Fry's Estate, Sup. Ct. Pa., W. N. C., Nov. 15, p. 408.

— Invalidity of passive trusts.—A will devising lands to executors in trust, contained this: "I direct my said trustees to permit and suffer my son, W. B. S., to have, receive, and take the rents, issues, and profits thereof, for the term of his natural life, and after his decease I give," etc. *Held*, that the son took a life estate in the lands, upon which the lien of a judgment would attach, and a judgment creditor of the son was a necessary party to the foreclosure of a prior mortgage upon the lands.—Verdin v. Slocum, Ct. App. N. Y., Alb. L. J., Jan. 5, p. 13.

TAXES.—Collection of taxes not restrained for legal informalities.—The collection of a tax will not be enjoined in equity for mere legal irregularities, such as that the assessment roll was not ready for review on the day prescribed: The property must have been exempt, or the levy without legal power, or the persons imposing it unauthorized, or they must have proceeded fraudulently. Albany, etc., Min. Co. v. Auditor General, Sup. Ct. Mich., Alb. L. J., Dec. 22, p. 451.

— Due process of law does not mean a judicial proceeding.—1. That the constitutional provision that no state shall deprive any person of life, liberty, or property without due process of law does not mean a judicial proceeding: 2. That a statute of a state which gives the tax-payer a right to enjoin the collection of a tax upon giving security, and have the validity of the tax decided by a judicial proceeding, is process of law: That taxes may be assessed and collected in a summary manner.—McMillan v. Anderson, U. S. Sup. Ct., C. L. N., Nov. 17, p. 65; *s. c.*, C. L. J., Nov. 23, p. 445.

— Exemption from taxation—Churches—Regular places of stated worship—Act of May 14, 1874, construed.—Under the act of May 14, 1874 (P. L. 158), land upon which a church is being erected, prior to its use as a regular place for public worship, is not exempt from taxation.—Rt. Rev. T. Mullen v. Commrs., etc., Sup. Ct. Pa., W. N. C., Dec. 27, p. 502.

— Highway tax—To be paid in labor—Conversion to money tax—Notice—Statute—Jurisdiction.—A highway tax due in labor cannot be converted into a tax payable in money, unless there is the statutory notice to appear and work at a certain time and places, and default thereon; The statute is mandatory in character, and the giving of the notice is essential and jurisdictional to the collection of the tax in money.—Biss v. Town of New Haven, Sup. Ct. Wis., Rep., Jan. 23, p. 127.

— Municipal corporations—Power and means of collecting taxes under act of 1873, ch. 102, etc.—County commissioner need not be party—Statute of limitations.—1. The city of Memphis filed a bill under the act of 1873, ch. 102, to which objection was made, by demurrer, that the bill alleges the lands and lots had been sold for taxes and bid in by the complainant, and points to no defect of title under the proceeding for sale; that, according to the allegations of the bill, complainant has acquired a perfect title, and her remedy is by an action of ejectment; *Held*, the act of 1873 gives the chancery court jurisdiction to evict persons from land, in behalf of a corporation that has bid the same in at the prices of the taxes due thereon: 2. The power given to the county commissioner to sue is merely cumulative to that of the corporation already vested by law: It is not necessary that the suit should be brought in his name: 3. It is not in the power of the corporation to relieve one and impose upon another a burden, and no laches on its part, or that of its officers, can defeat the right of the public to have collected and rightfully

appropriated the public taxes; As against this right there is nothing of such a character that justice requires an estoppel, or limitation should be asserted—*City of Memphis v. Looney*, Sup. Ct. Tenn., Tenn. L. Rep., January, p. 288.

—Uniform assessment—Violation of duty in assessment—Necessity of statutory affidavit—Evidence—Jurisdiction of equity to restrain issue of tax deed.
—1. That provision of our state constitution which declares that the rule of taxation shall be uniform requires a uniform *assessment* of value, and no tax upon property can be supported which does not proceed upon valid assessment, legally made, upon a uniform rule; 2. Violation or evasions of duty imposed by law to secure a just and uniform rule of assessment, whether occurring by mistake in law or by fraud in fact, which go to impair the general equality and uniformity of the assessment, and thereby to defeat the uniform rule of taxation, vitiate the whole assessment as the foundation of a valid tax (*Kelley v. Corson*, 11 Wis. 1., and *Miltimore v. Supervisors*, 15 Wis. 9, as to this point, *overruled*); 3. Under chapter 180, Laws 1868, the act of the assessor in making and annexing to, and filing with, the assessment rolls an affidavit that he has performed his statutory duty in the several particulars there enumerated, including the valuation of each parcel of real property from *actual view* of it, is essential to the validity of the assessment; and, when such affidavit has not been made, the facts which should appear by it cannot be shown *aliunde*, nor can the rule of the statute be relaxed by showing that compliance with it was impossible; 4. Equity will restrain the issue of a deed upon a sale of land, as for a delinquent tax, where there was no valid assessment, without requiring the proof of injury to the plaintiff from the pretended tax.—*Marsh et al. v. Supervisors* (with note), Sup. Ct. Wis., C. L. J., Dec. 14, p. 509.

UNLAWFUL ENTRY AND DETAINER.—Purchaser at orphans' court sale—Proceedings to recover possession of property—Affidavit of tenant in possession—When insufficient—Act of April 9, 1849, sec. 16—Appeal from magistrate's court.—In a proceeding before a magistrate by a purchaser at an orphans' court sale of the property of a decedent, to recover possession of the property under the act of April 9, 1849, sec. 16, the tenant in possession filed an affidavit that she claimed the premises in her own right as tenant in fee by title, and possession derived prior to the orphans' court sale; *Held*, that presumptively the tenant was in possession as one of the heirs of decedent, and that, as her affidavit did not sufficiently set out any title adverse to that of decedent, it was not adequate to prevent judgment against her.—*Hennegan v. Williams et al.*, Williams' Appeal, Sup. Ct. Pa., W. N. C., Dec. 6, p. 458.

USURY.—Forfeiture of excess of interest—When usury, though expressly prohibited by bank charter, does not avoid contract.—The charge of more than the rate of discount allowed in its charter, by a state bank, does not avoid the contract where the original contract of loan was legal and within the authority of its charter; In a suit by the bank, holders of the note, against the endorsers, *held*, that the loan itself, and the lawful part of the interest, were recoverable subject to a set-off of the excess of interest, or illegal part.—*Spahr et al. v. Carlisle Deposit Bank*, Sup. Ct. Pa., W. N. C., Nov. 29, p. 436.

WILL.—Construction of—"Heirs" construed to mean "representatives or distributees" in disposition of personal estate.—A testator, in 1836, after making several bequests, directed that after the death of his wife and two unmarried daughters, Elizabeth and Mary, the whole of his property, real and personal, remaining undisposed of by his will, should be sold by his executors, and the proceeds thereof divided in the manner following, viz.: "My son Christian shall have no part of the money raised out of my real estate; that is to be divided among my three daughters, Esther, the wife of Abraham Shelly, and the heirs of Elizabeth and Mary, in equal shares, including such sums received by them previous to such settlement;" *Held*, that the fund for distribution was strictly personal, and to be governed by

the ordinary rules applicable to the distribution of personal property; *Held, further*, that the word "heirs," as found in the will, must be construed as equivalent to "representatives or distributees;" *Held, further*, that Mary, having died without issue, leaving only her husband surviving her, the latter must be regarded as her heir as to such personal estate.—*Elby's Appeal*, Sup. Ct. Pa., W. N. C., Nov. 22, p. 428.

— Devise—Definite failure of issue—Equitable conversion of realty by direction to sell.—A provision by a testator, in his will, that any of his sons may take his real estate at an appraisement, does not prevent equitable conversion under an explicit direction that his real estate be sold and converted into money; A devised her estate in trust for C and D, her two sons, and, if one should die within twenty-one years without issue then living, the whole to the survivor; and, if both should die within twenty-one years without issue then living, then over; C died soon afterwards without issue, and D died within the twenty-one years, leaving issue *en ventre sa mere*, afterwards born; *Held*, that the words "then living" referred to the death of the sons; and that, D having died leaving issue then living, the devise took effect.—*Appeal of Laird et al.*, Sup. Ct. Pa., W. N. C., Dec. 18, p. 478.

— Construction of—Inconsistency—Apparent meaning—Insertion of implied clause.—Where, by the strict construction of a will, it is inconsistent in respect to the interest which one of the beneficiaries is to take—one part making the widow a mere trustee for the children, and another providing for the children in case of the death of the widow, and the true intent is apparent—rather than to hold the trust void for uncertainty, implied words will be inserted.—*Greenwood v. Greenwood*, Ct. App. Ch. Div. (Eng.), Rep., Jan. 2, p. 29.

VII. VALUABLE ARTICLES PUBLISHED IN LAW
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- ARBITRATION AND AWARD.**—Arbitration as a condition precedent.—Alb. L. J., Dec. 29, p. 464.
- BONDS, MUNICIPAL.**—The township bonds of Missouri, I.—C. L. J., Dec. 14, p. 499; Same, II, *id.*, Dec. 21, p. 518.
- BONDS, OFFICIAL.**—The liability of bondsmen as executors and administrators, and of officers.—C. L. J., Dec. 7, p. 478.
- CORPORATIONS.**—The citizenship of corporations.—Alb. L. J., Nov. 17, p. 844.
— *Ultra vires*.—C. L. J., Jan. 4, p. 2.
- COURTS.**—Judicial partisanship.—West. Jur., November, p. 684.
— The parliaments of France.—Am. L. Rev., January, p. 262.
— The need of reform in our Federal judicial system.—Alb. L. J., Jan. 5, p. 9.
- DAMAGES.**—Liquidated damages.—Am. L. Rev., January, p. 286.
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- DOWER.**—Effect of fraudulent conveyances upon the right of dower.—C. L. J., Nov. 30, p. 459.
- EMINENT DOMAIN.**—Eminent domain.—West Jur., December, p. 691.
- ESTOPPEL.**—The doctrine of equitable estoppel as applicable to married women and their separate statutory estates.—South. L. J., January, p. 2.
- EVIDENCE.**—The admissibility in evidence of books of art or science, which are of established reputation and authority, in cases where questions of science or art are involved.—C. L. J., Nov. 23, p. 439.
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